86-464

No. 86-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARTORI BROS. DISTRIBUTORS, *et al.*,

Petitioners,

v.

JYRL JAMES-MASSENGALE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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September 22, 1986

QUESTIONS PRESENTED

The Court below held that the fringe benefit portion of the California "makewhole remedy" was not preempted by the Employee Retirement Income Security Act (ERISA). That remedy, as interpreted by a California administrative agency and enforced by California courts, is an open-ended award requiring agricultural employers, found to have bargained in bad faith, to pay specified fringe benefit levels to its employees for an indefinite period into the future. The Ninth Circuit ruled that for a state law to be preempted, it must *both* relate to an employee benefit plan *and* "purport to regulate" the matters regulated by ERISA. The court concluded that the challenged law did not satisfy these requisites. The questions presented by this decision are:

1. Is the Court of Appeals' holding that a state law is not preempted by ERISA unless it *both* relates to employee benefit plans *and* purports to regulate matters specifically regulated by ERISA, contrary to this court's decision in *Shaw v. Delta Airlines*, 463 U.S. 85 (1983)?

2. Is the Court of Appeals' finding that the fringe benefit portion of the California makewhole award is a "one-time, lump-sum payment," thus affecting employee benefit plans in too remote, tenuous and peripheral a manner as to be preempted by ERISA, contrary to this court's interpretation of 514 in the line of cases from *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) to *Metropolitan Life Ins. Co. v. Massachusetts*, ____ U.S. ____, 105 S.Ct. 2380 85 L.Ed. 728 (1985)?

3. Is California's "makewhole remedy" in direct conflict with ERISA and thus preempted?

LIST OF PARTIES TO THE PROCEEDINGS

The plaintiffs-petitioners in this case are:

Martori Bros. Distributors, an Arizona Partnership; O. P. Murphy Produce Co., Inc., d/b/a O. P. Murphy & Sons, a Texas corporation; J. R. Norton Co., an Arizona corporation; and Mario Saikhon, Inc., a California corporation.

The defendants-respondents in this case are:

Jyrl James-Massengale, Chairman; Gregory L. Gonot, Board Member; Patrick Henning, Board Member; John McCarthy, Board Member; Jorge Carrillo, Board Member; Regional Director, El Centro; Regional Director, Salinas; Agricultural Labor Relations Board, State of California.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARTORI BROS. DISTRIBUTORS, *et al.*,

Petitioners,

v.

JYRL JAMES-MASSENGALE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Martori Brothers Distributors, O.P. Murphy Produce Co., Inc., J.R. Norton Co., and Mario Saikhon, Inc. hereby petition this court to issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment in *Martori Brothers, et al. v. Jyrl James-Massengale, et al.,* No. 84-6137, 84-6274, 84-6275 (9th Cir.; Jan. 30, 1986, as mod. April 1, 1986 and June 12, 1986, Petition for rehearing denied, June 24, 1986).

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California is unpublished. A copy of this decision appears at App. H-135a in a separately bound appendix to this peti-

tion (hereinafter "App."). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 781 F.2d 1349 (1986), as mod. at 791 F.2d 799 (1986). These decisions are reprinted at App. J-M.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 30, 1986. App. J-146a. A timely Petition for Rehearing En Banc was denied on June 24, 1986. App. M-169a. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

California Labor Code § 1160.3 (App. O-173a) provides that the Agricultural Labor Relations Board ("ALRB") may, upon a finding that an agricultural employer has refused to bargain in good faith with its employees' bargaining representative, construct a remedy "making employees whole". As interpreted by the ALRB, this "makewhole remedy" includes wages and fringe benefits that the employer might have agreed to had it bargained in good faith. Liability under this remedy continues until such time as the bargaining representative and the employer reach agreement or reach valid impasse.

Petitioners maintain that the fringe benefit portion of this remedy is preempted by ERISA § 514, 29 U.S.C. § 1144 (App. N-170a). That section specifies that ERISA should supersede any and all state laws as they may now or hereafter relate to any employee benefit described in and not exempted by the language of ERISA.

STATEMENT OF CASE

Each of the petitioners are agricultural employers engaged in interstate commerce and operating in California. Each provide ERISA covered plans to their respective employees. Each of these ERISA covered plans provide covered employees with differing levels of benefits and have differing eligibility and vesting requirements.

The ALRB is the state administrative agency that was created by the California State Legislature upon passage of the Agricultural Labor Relations Act ("ALRA") (Cal. Labor Code §§ 1140, et seq.). Chapter 2 of the ALRA specifically creates the ALRB, which consists of five members.

The ALRB is empowered by California Labor Code § 1142 to conduct hearings and make determinations relating to unfair labor practices by agricultural employers and unions. Pursuant to the California Labor Code provision in question, § 1160.3, the ALRB has the power to impose appropriate remedies for such unfair labor practices.

In this case, the ALRB has adjudged that each of the petitioners have violated the ALRA by refusing to bargain in good faith. (Martori Bros., 8 ALRB. No. 23, App. E-87a; O.P. Murphy Produce Co., 5 ALRB No. 63, App. C-50a; J.R. Norton Co., 6 ALRB No. 26, App. O-80a; and Mario Saikhon, Inc., 8 ALRB No. 88, App. G-108a.) In each case, the ALRB ordered the employer to make its agricultural employees whole for all losses resulting from the refusal to bargain in good faith.

The makewhole award in each of these petitioners' cases includes the award of a sum of money representing fringe benefits which the ALRB has determined would have been given to employees under a hypothetical collective bargaining agreement. This hypothetical contract includes what the ALRB determines the wage and fringe benefits would have been had the employer bargained in good faith. Once this hypothetical contract is determined, the ALRB assesses liability against each employer, amounting to the difference between what that employer actually paid during the relevant period of time, and the ALRB's hypothetical contract. The ALRB makewhole remedy is an ongoing remedy. The employer is liable for the difference between the ALRB's hypothetical contract and what the employer actually pays until such time as a contract is agreed to or the employer and the employee's bargaining representative have bargained to valid impasse.

In the United States District Court for the Southern District

of California, petitioners requested declaratory and injunctive relief from the orders and decisions of the ALRB. Petitioners sought the court's declaration that § 1160.3, as interpreted and enforced by the ALRB, was preempted by ERISA, as well as an injunction prohibiting the ALRB from regulating and/or formulating the employee benefit plans offered by petitioners. Additionally, petitioners requested that the ALRB be prohibited from awarding makewhole remedies to agricultural employees which include payouts for fringe benefits.

The District Court, upon hearing cross-motions for summary judgment, denied petitioner's motion for summary judgment and granted respondent's motion, finding that the state statute, as interpreted by the ALRB, was not preempted by ERISA. App. I-144a.

On appeal, the Ninth Circuit Court of Appeals phrased the issue as determining whether Labor Code § 1160.3, as interpreted and implemented by the ALRB, was preempted by ERISA. The court stated that, "Section 1160.3 is preempted if it both 'relate(s)' to an ERISA plan and 'purport(s) to regulate, directly or indirectly' ERISA plans." 781 F.2d at 1356.

The appellate court upheld the summary judgment against petitioners, finding that a

> ...state law is preempted by § 514(a) if the conduct sought to be regulated by the state law is 'part of the administration of an employee benefit plan'; that is, the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans. 781 F.2d at 1358.

The court stated that Labor Code § 1160.3 did not purport to regulate any of the specific areas covered by ERISA and therefore was not preempted. 781 F.2d at 1359.

REASONS FOR GRANTING THE WRIT

Summary of Argument

The decision below is flatly contrary to this court's guiding decisions on ERISA preemption, *Alessi*, 451 U.S. 504, (1981) and *Shaw*, 463 U.S. 85 (1983).

In *Shaw*, this court held that the preemptive scope of ERISA § 514(a) was to be read very broadly. The court held that any state laws that "relates to" pension plans governed by ERISA would be within the preemption provision. The court stated that the phrase "relates to" was to be given its broad common sense meaning holding that a state law "relates to" a benefit plan and is thus preempted if that law "has a connection with or reference to such a plan." 463 U.S. at 97. In *Alessi*, the court stated that, "even indirect state actions bearing on private pension plans may encroach upon the area of exclusive federal concern." 451 U.S. at 525.

In the Ninth Circuit's decision, the court held that not only must a state law "relate to an employee benefit plan to be preempted, it must *also* purport to regulate matters specifically regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans." The appellate court held that if a state law does not purport to regulate the areas that are regulated by ERISA, it could not be preempted. 781 F.2d at 1359.

The appellate court stated that, "ERISA does not purport to regulate the broad spectrum of unlawful employment practices that may be committed by employers: thus ERISA does not prevent a state agency from including in its 'makewhole' awards sums calculated with reference to fringe benefits." 781 F.2d at 1359.

Based on the above, it is clear the Ninth Circuit disregarded this court's guidance with regard to the scope of the preemptive provision of ERISA. This court's decisions have clearly established that regardless of whether the law purports to regulate matters regulated by ERISA or not, the true test is whether the law in effect "relates to" such a plan in the broadest sense. By its own language, the appellate court's "preemption test" is contrary to

this court's, and should be reversed.

The appellate court's decision also misconstrued the very nature of the California makewhole award by analogizing it to a one-time award of damages. In fact, the award is an ongoing obligation requiring the employer to maintain and pay fringe benefits at the levels established by the ALRB until such time as the union and employer reach agreement or impasse. Until one of these two occurrences takes place, the employer is obligated to continue making the makewhole payments, including the fringe benefit portion, at the levels established by the ALRB.

Petitioners maintain that the ALRB's assessment of the fringe benefit portion of the makewhole remedy is preempted by ERISA as it impermissibly relates to employee benefit plans. Even more compelling is the fact that such makewhole awards disregard and conflict with specific provisions of ERISA. This is so because the makewhole award forces the affected employers to pay their agricultural employees certain amounts of fringe benefits without any regard to vesting requirements, eligibility requirements, or the tax ramifications of those payouts. Thus, while ERISA allows employers to establish vesting requirements, eligibility requirements, and the level of benefits, the ALRB's makewhole remedy takes this discretion away from the employer.

For the above reasons, petitioners maintain that the fringe benefit portion of the California makewhole award is preempted by ERISA and that the appellate court's decision upholding the summary judgment against petitioners was based upon a misconstruction and misapplication of ERISA's preemptive provision, as interpreted by this court.

ARGUMENT

I.

THE DECISION BELOW IS DIRECTLY CONTRARY TO THIS COURT'S INTERPRETATION OF THE PREEMPTIVE SCOPE OF ERISA.

This Court has addressed the preemptive scope of § 514(a) of ERISA in a line of cases from *Alessi,* 451 U.S. at 504, to *Shaw,* 463 U.S. at 85, and more recently, in *Metropolitan Life Ins. Co.*, 105 S.CT at 2380. In these cases, this Court has definitively interpreted Congress' intent in enacting the broad preemptive language of § 514. These cases make it clear that § 514 does not only preempt state laws dealing with subject matters specifically covered by ERISA, but preempts any law that relates to an employee benefit plan.

In *Alessi,* the Court found that ERISA preempted a state statute which provided that workers' compensation benefits may be set off against disability pension benefits but not against employees' retirement benefits. The rationale for this finding was that whatever the purpose of the state law, it "relates to" pension plans and thus impermissibly intrudes on the federal regulatory scheme. This Court made short work of the argument that New Jersey raised regarding the purpose of the statute as being solely concerned with protecting an employee's right to workers' compensation and disability benefits. This Court noted:

> *Whatever the purpose or purposes of the New Jersey statute,* we conclude that it relates to pension plans governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law.
>
> * * *
>
> *It is of no moment that New Jersey intrudes indirectly, through a workers compensation law, rather than directly through a statute called pension regulation. ERISA makes it clear that even indirect state action bearing on private pensions*

> *may encroach upon the area of exclusive federal concern.*
>
> * * *
>
> ERISA's authors clearly meant to preclude the states from avoiding through form the substance of the preemption provision.

Alessi, 451 U.S. at 524-525 (emphasis supplied).

In *Shaw,* this court again reviewed the scope of the preemption provision of ERISA. *Shaw* dealt with Human Rights Law, N.Y. Exec. Law 290-301 (McKinney 1982 and Supp. 1982-1983) (hereinafter referred to as "HRL"), which was a comprehensive anti-discrimination statute prohibiting, among other practices, employment discrimination on the basis of sex.

The *Shaw* court was also faced with the Disability Benefits Law, N.Y. Work.Comp. Law § 200-242 (McKinney 1965 and Supp. 1982-1983) (hereinafter referred to as "DBL"), which required employers to pay certain benefits to employees unable to work because of non-occupational injury or illness.

The *Shaw* court was faced with resolving whether or not the HRL and the DBL "related to" employee benefit plans. The court relied upon its holding in *Alessi,* and restated the broad preemptive reach of § 514(a) of ERISA, 29 U.S.C. § 1144(a). The *Shaw* court stated that while, in *Alessi,* the court found preemption based on the conflict between the New Jersey statute and ERISA, no such conflict was present in the New York law before it. The *Shaw* court stated that the finding of preemption in *Alessi* was not based on the preemptive scope of ERISA, and its legislative history, but on the state law's frustration of ERISA's intent. With this background, the *Shaw* court went on to examine the preemptive scope of § 514.

The *Shaw* court specifically held that a law "relates to an employee plan in the normal sense of the phrase if it has a connection with *or reference to* such a plan. *Black's Law Dictionary* 1158 (5th Ed. 1979) ("Relate: To stand in some relation; *to have*

bearing or concern; to pertain; *refer*; to bring into association with or connection with"). *See also Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 695 (1933)." Employing that definition, this Court had no difficulty in determining that the HRL and the DBL both clearly relate to benefit plans since the HRL prohibits employers from structuring their plans in a specific manner and the DBL requires employers to pay its employees specific benefits.

The *Shaw* court noted that Congress used the words "relate to" in their broadest sense in Section 514(a), since within the statute itself, Congress saw fit to specifically exempt generally applicable state criminal statutes from the preemption provisions in §514(b), 29 U.S.C. §1144(b). The Court also indicated that the intention that these words be interpreted in their broadest sense was apparent from the legislative history of §514(a). There, the conference committee rejected a more limited scope to the ERISA preemption provisions and expressly provided for the present language. The committee indicated that the section's preemptive scope was as broad as its language. *See* H.R. Conf. Rep. No. 93-1280, p. 383 (1974); S. Conf. Rep. No. 93-1090, p. 383 (1974).

Comparing the Ninth Circuit test for ERISA preemption to the above decisions of this court clearly establishes that the Ninth Circuit's decision is flatly contrary to this court's precedent. In its initial discussion of whether the California law was preempted, the Ninth Circuit set forth a two-part test requiring far more than the "relates to" test established by the *Shaw* court. On this point, the Ninth Circuit stated:

> Section 1160.3 is preempted if it *both* 'relate[s]' to an ERISA plan *and* 'purport[s] to regulate, directly or indirectly,' ERISA plans.

781 F.2d at 1356 (cites omitted) (emphasis supplied).

The appellate court expressly stated that it was adding a second prong to the "relates to" test established by the *Shaw* court, requiring further that the challenged law also "purport to regulate" an ERISA plan before it is preempted. On this point, the appellate

court stated:

> We have held, as has the Second Circuit, that under Section 514(c)(2) *a state law must also "purport to regulate" ERISA plans before it can be held to be preempted. Lane*, 743 F.2d at 1339; *Rebaldo*, 749 F.2d at 137 & n.1. This second prong of the preemption test seems to have been over-shadowed by the "relates to" test found in Section 514(a), although *the two prongs are both important. See Lane*, 743 F.2d at 1339; *Rebaldo*, 749 F.2d at 137 ("purport to regulate" test imposes a limit on the reach of the preemption clause in ERISA). As a logical matter, if a state law does not "relate to" ERISA plans, it cannot "purport to regulate" them, for "relates" includes, but is much broader than, "purports to regulate." Thus, we conclude that, a fortiori, California Labor Code § 1160.3 does not "purport to regulate" ERISA plans.

781 F.2d at 1359 (footnote omitted) (emphasis supplied).

The appellate court's decision also disregards this Court's express language in *Shaw*, stating that a state law can be preempted even if it is not designed to affect employee benefit plans and is not designed to deal with the subject matters covered by ERISA. Specifically, in *Shaw*, this Court stated:

> To interpret Section 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of Section 514.
>
> * * *
>
> Nor, even with legislative history, can Section 514(a) be interpreted to preempt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility and the like.

463 U.S. at 98.

After reviewing a number of ERISA preemption cases, the appellate court ignores the above statement of this Court to conclude:

> The principle underlying all of these decisions would appear to be that the state law is preempted by Section 514(a) if the conduct sought to be regulated by the state law is "part of the administration of an employee benefit plan"; that is, the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans. See *Scott,* 754 F.2d at 1505.

781 F.2d at 1357-58.

In its closing comments, the appellate court again shows that it has acted flatly contrary to this court's precedent in *Alessi.* In *Alessi,* this Court held that regardless of the purpose or purposes of the challenged statute, if it relates to an ERISA plan, it is preempted. This Court pointed out that it is "of no moment that New Jersey intrudes indirectly through a worker's compensation law, rather than directly through a statute called pension regulation [to be preempted]." In sharp contrast, the appellate court looks to the purpose of the state law in determining that it was not preempted. On this point, the appellate court stated:

> We cannot ignore the reality that when Congress enacted ERISA, "federal exclusivity [was] a corollary of regulatory coverage, not an independent statutory goal." *California Hospital Association,* 770 F.2d at 861. ERISA does not purport to regulate the broad spectrum of unlawful employment practices that may be committed by employers: thus ERISA does not prevent a state agency from including in its "make-whole" awards sums calculated with reference to fringe benefits.

781 F.2d at 1359.

Thus, it is clear the appellate court disregarded Congress' intent and this Court's mandate established in *Shaw* and *Alessi* when it reached its conclusion that the challenged state law is not preempted.

More recently, in *Metropolitan Life Ins. Co.,* 105 S. Ct. 2380, this Court analyzed a Massachusetts statute to determine if it was preempted by ERISA. The statute in question mandated that certain minimum mental health care benefits be provided to Massachusetts residents insured under general health care plans covering hospital and surgical expenses. The appellants, insurance companies required to provide these minimal health benefits, argued that the Massachusetts law was preempted by ERISA. The State of Massachusetts maintained that this law is a "law which regulates insurance" and as such is saved from the general preemption clause of ERISA.

The Supreme Judicial Court of Massachusetts held that the statute was not preempted by ERISA. On appeal to this court, 463 U.S. 1221 (1983), the judgment of the Supreme Judicial Court was vacated and the case remanded for further consideration in light of *Shaw.* The Supreme Judicial Court reinstated its former judgment and the insurers appealed again to this court.

In reliance on the preemptive interpretation of *Shaw* and *Alessi,* this Court quickly concluded that the Massachusetts law "related to" an employee benefit plan and, therefore, was within the reach of ERISA's preemption provision. The Court stated that the statute was within the preemption scope even though it was consistent with ERISA. The court ruled that even though the law in question was *not a benefit plan law,* it bore "indirectly but substantially" on insureds' benefit plans, as it required them to purchase the mental health benefits specified in the statute. This precise reasoning applies to the instant case.

As in *Metropolitan Life Ins. Co.,* Labor Code § 1160.3, as construed by the ALRB, requires employers to provide a certain level of benefits on certain terms to its employees. Although § 1160.3 does not "purport to regulate" an employee benefit plan, its application by the ALRB bears substantially on the petitioner's benefit

plans as it is in fact creating a benefit package. Clearly, a law requiring an employer to provide a set level of benefits, on set terms, on an ongoing basis, relates to an employee benefit plan and is therefore preempted.

In *Metropolitan Life Ins. Co.,* The Massachusetts law was saved from preemption as it satisfied the provisions of the "deemer clause" which sets out an exception for laws regulating insurance. As § 1160.3 is clearly not an insurance law, it is not saved by the exception and thus is clearly preempted.

II

SUPREME COURT REVIEW IS NECESSARY BECAUSE THE COURT OF APPEALS' HOLDING THAT THE MAKEWHOLE REMEDY IS NOT PREEMPTED BY ERISA IS BASED ON A FUNDAMENTAL MISCHARACTERIZATION OF THE NATURE OF THAT REMEDY

The Court of Appeals' conclusion that the fringe benefit portion of an ALRB makewhole award is not preempted by Section 514 of ERISA is premised on its incorrect perception of the makewhole award as a "one-time, lump-sum payment." In fact, the makewhole award is not a "one-time, lump-sum payment," but is actually an ongoing obligation involving a potentially limitless number of payments. When properly characterized, it is clear that the makewhole award does "relate to" employee benefit plans, and hence is preempted by ERISA. Accordingly, Supreme Court review is necessary to protect ERISA's Congressionally-intended purpose of reserving to the Federal Government the sole power to regulate the field of employee benefit plans.

The ALRB is authorized by California Labor Code Section 1160.3 to order an employer to make its employees whole for losses resulting from the employer's refusal to bargain. To calculate the amount of makewhole due to the employees, the ALRB has devised a system whereby it estimates the difference between the pay the employees received and the pay that they theoretically would have

received but for the employer's refusal to bargain in good faith. That difference is arrived at by comparing the amount of the employees' pay with the amounts received by employees under successfully negotiated collective bargaining agreements *(Holtville Farms, Inc. v. ALRB,* 168 Cal.App.3d 388, 391-392 (1985); *Adam Dairy,* 4 ALRB No. 24 (1978) App. A-1a.

The ALRB also determined that the term "pay" would include fringe benefits.

> The record in this case shows that the UFW has standard contractual clauses providing for health and medical coverage through the Robert F. Kennedy Health Plan, pension benefits through the Juan de la Cruz Pension Plan, and social educational services through the Martin Luther King Fund, as well as clauses providing, where appropriate, for such benefits as overtime pay, shift premiums, paid vacations and holidays, and compensation during travel time and standby time. All such items are encompassed by the term "pay" and it is therefore within our power to order that employees be compensated for their loss.
>
> * * *
>
> We begin first with the concept that fringe benefits are an element of the total compensation paid by an employer to an employee. In some instances, this compensation is diverted to deposit the funds which provide benefits to the employees through an administered plan. In other forms, it is paid directly to employees; for example, overtime, vacation pay, holiday pay, standby pay, etc. Irrespective of the form which the benefit takes, however, it is ultimately calculable in terms of a dollars per hour figure. Because these various benefits are employee compensation, and hence pay within our broad definition, it is our intent to order that their value be paid directly to the workers involved as an aspect of the

gross makewhole award.

Adam Dairy, 4 ALRB No. 24, App. A-6a, 18a.

The ALRB, taking judicial notice of publications of the U.S. Department of Labor, Bureau of Labor Statistics, held that fringe benefits constitute 22 percent of an employee's total compensation. Consequently, it held that the amount of makewhole awarded to an employee would be calculated by assuming that the amount determined to be the wages an employee would have recieved if the employer had bargained in good faith, was only 78 percent of his total compensation, and that an additional 22 percent must be added for fringe benefits.

In *Robert H. Hickam,* 9 ALRB No. 6 (1983), App. F-95a, the ALRB modified its method of calculating fringe benefits. The ALRB deducted 6.3 percent from the 22 percent fringe benefit figure because that percent represented madatory fringe benefits, such as unemployment insurance and social security, which were not subject to collective bargaining. In this regard, the ALRB stated:

> [I]n order to make an employee whole, the wage rates computed pursuant to the previously stated formulas (both hourly and piece rates) will be assigned a value of 78.0 percent and fringe benefits will be assigned a value of 22.0 percent, 15.7 percent for voluntary benefits and 6.3 percent for mandatory benefits.
>
> The evidence shows that Respondent herein made the legally required payment to those funds. As the employees have actually received the benefit of those legally required fringe benefits, there is no need for us to provide for them as part of a makewhole award. Therefore, the gross makewhole wage shall be reduced by 6.3 percent to reflect the mandatory payments made by Respondent.
>
> Voluntary payments made to fringe benefit funds or directly to the employee shall be deducted from

> the gross makewhole award to the employee for that particular year. In this case, those employees who received vacation pay and/or bonuses shall have their makewhole awards for that year reduced by the amounts they actually received in such fringe benefits.

9 ALRB No. 6, App. F-103a-104a[1] (emphasis supplied.)

The ALRB's makewhole award against petitioners mandates that they pay directly to their employees 22% of an ALRB established hourly wage for certain fringe benefit contributions the ALRB deemed was due. The make-whole award so constituted does not make allowances for employer-determined eligibility requirements, vesting requirements, proration requirements, or any other restrictions upon payment of these monies, including tax ramifications. This is a similar situation to that faced by this Court in *Alessi*.

The state law in question, Labor Code § 1160.3, as interpreted by the ALRB in its decisions *Perry Farms, Adam Dairy,* and *Hickam*, directly regulates all aspects of the benefit programs provided by the petitioners, including eligibility, participation, vesting, benefit accrual, forfeitures, tax implications, as well as disclosures. The ALRB's makewhole remedy, as it relates directly to these petitioners, mandates that they provide direct payments without regard

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[1] In a subsequent case, J.R. Norton Co., 10 ALRB No. 42 (1984), the ALRB again changed its method of computing the amount of makewhole due for fringe benefits. The ALRB held that in cases from that date on, fringe benefits would be calculated in the same manner as that used to calculate wages for a makewhole award: by comparing the value of fringe benefits actually received by the employees with the value of those received under contracts which were successfully negotiated with the union. Accordingly, the fringe benefits given under these contracts—medical benefit plans, pension plans, special holidays, rest periods, overtime, etc.—are all imposed on the respondent employer pursuant to the makewhole award. *J.R. Norton Co.* was reversed on other grounds and remanded to the ALRB by the California Court of Appeal in an unpublished decision; but the ALRB has at no time indicated that it will not be following the method of calculating makewhole awards for fringe benefits announced in that case. *J.R. Norton Co.'s* holding in regard to fringe benefits is discussed in a subsequent California Court of Appeal case, *Holtville Farms, Inc. v. ALRB*, 168 Cal.App. 3d 388 (1985).

to eligibility requirements; whether or not the employees would be entitled to participate, and without regard to what, if any, vesting or forfeiture requirements would or would not be specifically applicable under the ERISA statutes. The make-whole award instead mandates that a direct, out-of-pocket, specified cash payment be made to employees to compensate for fringe benefits without regard to petitioner designed preconditions which are specifically validated under ERISA.

Clearly, the ALRB's makewhole award "relates to" employee benefit plans of the type regulated by the provisions of ERISA. The ALRB orders sums of money awarded to employees based on the amounts of fringe benefits it deems would have been given to the employees but for the employer's refusal to bargain. The amount of the fringe benefits package is determined by looking at the fringe benefits—medical plans, pension plans, vacation programs, etc.—provided in other contracts, regardless of what fringe benefits are actually provided by the employer.

Nonetheless, the Court of Appeals held that the fringe benefit portion of the makewhole award was not preempted by ERISA. This result was reached because of the Court's incorrect understanding of the nature of the makewhole award.

The District Court in the instant action found that the ALRB's makewhole award is a "one-time award of employee damages..." (Findings of Fact and Conclusions of Law, p. 9, App. H-140a). The Court of Appeals continued this erroneous conception of the nature of the award. A makewhole award, the Court of Appeals found, is only a "one-time, lump-sum payment." 781 F.2d at 1353. Therefore, the Court held that ERISA did not preempt the fringe benefit portion of a makewhole award because a makewhole order "is no more than an order to the Employers to pay damages to their employees; it is no different from any other award of damages." 781 F.2d at 1353, 1358.

The Court of Appeals has fundamentally misconstrued the nature of the makewhole award. Unlike other damage awards, the makewhole award is *not* a "one-time, lump-sum payment." Instead, it is an ongoing, continuous remedy which can involve a poten-

tially unlimited number of payments.

The ALRB makewhole orders applicable to petitioners do not have a fixed dated upon which liability is cut off. The makewhole obligation extends "until such time as [the employer] commences good faith bargaining with the [union] which results in a contract or a bona fide impasse." (Adam Dairy App. A-13a.)

The makewhole award is not, therefore, a "one-time, lump-sum payment;" it is an obligation that continues until either a contract or a bona fide impasse is reached with the union. Thus, although the compliance hearings for any ALRB order might establish the amount due at that time under the makewhole remedy, the employer's obligation to continue making payments at the ALRB determined level is ongoing until such time as one of the above two conditions is met. Thus, at a later point in time, if the union and employer have still not reached a contract or impasse, and the employer has not raised his fringe benefit level to the levels established in the makewhole order, there will be another hearing determining how much is owed at that time. This process continues into the future and until such time as a contract or impasse is reached.

Properly analyzed, then, the makewhole award is an ongoing obligation of the employer. As previously explained, a substantial portion of that award is an amount designed to represent fringe benefit payments which might have been made if the employer had bargained in good faith. Regardless of the type and level of fringe benefits payments actually made by the employer, regardless of the employer's vesting and eligibility requirements, the ALRB determines what amounts of fringe benefits the employer should have been paying based on the fringe benefit plans of other employers, and orders that amount paid. If, as is the case with these petitioners, no contract or bona fide impasse is reached with the union, the ALRB-imposed fringe benefit plans go on indefinitely. The discretion given to the employer by ERISA as to which benefit programs to offer, the levels of those fringe benefits, and the vesting and eligibility requirements of those programs, has been taken away by the ALRB's makewhole award. Consequently, when the makewhole remedy is properly characterized, it becomes obvious that its fringe benefit portion is preempted by ERISA.

Petitions for Rehearing and Suggestion for Rehearing En Banc were filed with the Court of Appeals, in which the Court's erroneous perception of the duration of the makewhole remedy, and the effect of that misperception, were brought to the Court's attention. The Court of Appeals' only apparent response was an Order, dated April 1, 1986, adding a footnote to its Opinion:

> While a 'makewhole' order does require the employer to continue to make its employees whole until such time as it bargains in good faith, the practice of the ALRB appears to be to fix specific beginning and ending dates and calculate the 'makewhole' amount for that period. The award is the final award for that period. Then, if it is later determined that the employer continued to act in bad faith, a new ending date is fixed, and a new award is made, covering the period from the first ending date to the new ending date. Thus, a lump-sum award is made for each period. [citations omitted]."

App. K-164a.

This footnote, while appearing to perhaps recognize that the makewhole award is potentially unending, completely fails to address the effect of that fact upon the Court of Appeals' holding in the case. The opinion is still premised on the Court's characterization of the makewhole award as a "one-time, lump-sum payment." As explained above, when it is realized that the makewhole remedy is an ongoing obligation, mandating an employer to pay certain benefits at certain levels for an indefinite duration, it necessarily follows that the fringe benefit portion of the makewhole remedy is preempted by ERISA.

Supreme Court review is therefore necessary in this case to correct the Court of Appeals' erroneous analysis of the makewhole award, and hence to correct the Court of Appeals erroneous holding that the fringe benefit portion of a makewhole award is not preempted by ERISA. Only by granting this Petition for Review, and subsequently reversing the Court of Appeals' decision, can this Court protect the Congressional intent, as embodied in ERISA, to reserve

to the federal government the sole power over the field of employee benefit plans.

III.
THE MAKEWHOLE AWARD DIRECTLY CONFLICTS WITH PROVISIONS OF ERISA.

As previously discussed, this Court has held that it is not necessary for a state law to conflict with provisions of ERISA to be preempted. Preemption takes place merely if the state law "relates to" employee benefit plans. In the instant case, not only does the Act and the ALRB's actions "relate to" employee benefit plans, but *the makewhole award requiring payments for fringe benefits directly conflicts with various provisions of ERISA.*

In awarding its gross makewhole award, the ALRB includes a direct payment calculated to represent the monetary value of fringe benefits the employee would have received but for the employer's alleged unlawful conduct.

In *Adam Dairy*, the ALRB went on to detail the exact method it uses to determine the value of the benefits it includes in its award. By this method, the ALRB mandates which benefits will be provided for precise benefit levels, determines who is to recieve those benefits, and finally determines how these benefits are going to be paid. Lastly, and most intrusively, by including payments that should have been paid to employee benefit plans as part of the gross makewhole award, appellees are altering the tax consequences established in ERISA.

First and foremost, while ERISA does set various uniform standards including rules concerning reportings, disclosures and fiduciary responsibilities, it does not mandate that employers provide any particular benefits to is employees. *Shaw*, 463 U.S. at 91. ERISA also does not mandate specific eligibility standards for participation in an ERISA covered plan. Such eligibility standards are left to the discretion of the employer. What ERISA does require are *minimum* standards for participation in ERISA plans. Section 202 of ERISA, 29 U.S.C. § 1052 provides that a pension plan must allow an employee to participate no later than the earliest date at

which he has completed at least one year of service and is 25 years old.

Similarly, ERISA allows employers to establish their own vesting requirements for plan coverage, with a certain minimum. Section 203 of ERISA, 29 U.S.C. § 1053 imposes limits on the period of service a plan may require an employee to complete before the employee's accrued benefits become nonforfeitable (i.e., "vesting").

In the same regard, the employer is permitted to establish when payment of benefits will commence. Section 206(a) of ERISA, 29 U.S.C. § 1056(a) simply provides that a plan generally must provide for the commencement of payment of pension benefits at the later of either the time the employee participant reaches age 65, the tenth anniversary of the employee's participation in the plan, or the date of the employee's termination of service.

With the above provisions in mind, it is apparent that the ALRB has taken it upon itself to modify provisions of ERISA established by Congress. Congress has allowed employers to determine their own eligibility standards, vesting requirements, benefit commencement schedules, levels of benefits, and to decide whether they will have a plan at all. The ALRB has taken away that Congressionally-granted discretion, and imposed its own requirements on employers.

The ALRB has mandated that petitioners, and each of them, maintain specified plans for the makewhole period. Further, the ALRB has established the eligibility for receipt of such benefits (employment at any time during the makewhole period, *Robert H. Hickam*, App. F at 104a), the vesting requirements (none), commencement date of payments, and lastly, the level of such benefits. Not only has the ALRB eliminated the discretion left to employer, but they have established new minimums for all of the above aspects of the relevant plans.

According to ALRB decisions, if an employee within the relevant unit worked one hour within the makewhole period, that employee would be entitled to a payment which is comprised of the ALRB's estimation of the benefits he would have recieved. This payment includes benefits from the medical plan, pension plan,

Martin L. Luther King Fund, vacation and holiday. *Hickam.* Under ERISA and the then existing benefit plans of petitioners, this same individual would not be eligible for any benefits. This is a *prima facie* showing that not only do the challenged actions of the ALRB "relate to" employee benefit plans, they directly conflict with provisions of ERISA.

An even more telling example of how the challenged actions of the ALRB conflict with the provisions of ERISA is the tax implication of said actions. ERISA was enacted to be a comprehensive statute encompassing modifications in labor law, the Internal Revenue Code (hereinafter "IRC"), and other various federal laws. These modifications were all undertaken to provide a complete national standard for the design, administration, and operation of private employee benefit plans.

Under the IRC, amounts paid by an employer to an ERISA qualified health plan for compensating an employee (through insurance or otherwise) for personal injuries or sickness are not includible in the employee's gross income for income tax purposes (26 U.S.C. § 106) or in the employee's wages for purposes of employer or employee social security, railroad retirement, unemployment insurance, or payroll taxes (26 U.S.C. § 3121(a)(2), § 3131(e), and § 3306(b)(2)).

Benefits paid to an employee under an ERISA qualified employer health plan are excluded from gross income for income tax purposes and from wages for employment tax purposes, if the benefits are paid directly or indirectly to the employee as reimbursement for expenses incurred by the employee, or the employee's spouse or dependents, for medical care (26 U.S.C. § 105(b)). A deduction generally is allowed to an employer as an ordinary and necessary business expense for employee compensation paid in the form of contributions to a health plan (26 U.S.C. § 162).

Further, if an employer-provided fringe benefit program qualifies under certain statutory provisions of the income tax law and ERISA, then the benefits provided under the program are excludable (generally subject to dollar or other limitations) from the employee's gross income for income tax purposes. (The income

tax exclusions also generally apply for payroll tax purposes.) Those costs which are excluded from the employee's income nonetheless are deductible by the employer (as are costs not so excluded), provided that they constitute ordinary and necessary business expenses (26 U.S.C. § 162).

Under present ALRB decisions, the above-discussed benefit payments are included in a gross makewhole award. Such awards would be considered straight income to the recipient employees, and would be taxable as ordinary income. *Social Security Board v. Nierotko*, 327 U.S. 358 (1946); IRS Letter Rulings 8052103 (Oct. 3, 1980) and 7851085 (Sept. 22, 1978), CCH IRS Letter Rulings Reports, App. P-Q.

Where an employer would be making a specified contribution to an employee's health plan, that contribution would not be taxable income. This is so even if the employee takes advantage of the health plan and is reimbursed for medical expenses. Pursuant to the ALRB award, the employee is to directly receive the value of the employer's contribution to the health plan in cash. Such a payment *is taxable* if not made for reimbursement for actual medical expenditures (26 U.S.C. § 105(b)).

It is apparent that Congress left certain decisions regarding ERISA covered programs to the employer. Such decisions include when an employee would be eligible for benefits, when such benefits would become non-forfeitable, the level of such benefits, and other such decisions relating to the administrative functions of the plans. It is also clear that the ALRB, by its makewhole remedy, has taken away such discretion from the employer, and mandated new terms upon the parties. Regardless of whether such actions are warranted because the employers have allegedly violated the California Labor Code or because said employers discriminated against an employee based on pregnancy as in the *Shaw*, such actions are in conflict with ERISA, relate to ERISA, and, therefore, are preempted by ERISA.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARTORI BROS. DISTRIBUTORS, *et al.*,

Petitioners,

v.

JYRL JAMES-MASSENGALE, *et al.*,

Respondents.

Appendices to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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September 22, 1986

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APPENDIX A

ADAM DAIRY
4 ALRB NO. 24 (1978)
DECISION AND ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD

April 26, 1978

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ADAM DAIRY dba
RANCHO DOS RIOS,

Respondent,

and

UNITED FARM WORKERS
OF AMERICA, AFL-CIO,

Charging Party.

Case Nos. 76-CE-15M
76-CE-36M

4 ALRB No. 24

DECISION AND ORDER

On May 3, 1977, Administrative Law Offices (ALO) Morton P. Cohen issued the attached Decision in the proceeding. Thereafter, General Counsel, Respondent and Charging Party each filed exceptions.[1] The exceptions of both General Counsel and Charging Party were concerned solely with the remedial portion of the Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to af-

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[1] General Counsel moved to dismiss Respondent's exceptions for failure to comply with Section 20282(a) of the Board's regulations. This motion is denied. Respondent submitted 64 exceptions which refer to particular statements, findings, or conclusions in the ALO's Decision. In some cases the grounds for the exception are not clearly stated, and references to support in the record are not sufficiently specific to be helpful in locating evidence relevant to Respondent's arguments. From a strictly technical point of view, some of these exceptions are adequate and some are not. We have reviewed the record in this case in light of all these exceptions rather than partially dismissing them on technical grounds.

firm the rulings, findings, and conclusions of the ALO except as modified herein.

The violations found in this case are illegal discharges for union support or activity in violation of Labor Code Section 1153(a) and (c), and illegal refusal to bargain in violation of Labor Code Section 1153(a) and (e). Extensive and generally conflicting testimony was taken from the principal participants in the events surrounding the discharges and the course of bargaining. The resolution of conflicts in this evidence frequently turns on credibility and is at the heart of the ALO's findings of liability in this case. Many of Respondent's exceptions challenge findings of fact which turn on credibility resolutions. In determining whether to reverse a trial examiner's findings on credibility, we, like the National Labor Relations Board, consider the entire record, and believe great weight should be accorded the ALO's assessment of credibility based on his observations of the demeanor of witnesses. *El Paso Natural Gas Company*, 193 NLRB 333, 78 LRRM 1250 (1971); *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 26 LRRM 1531 (1950); *Tex-Cal Land Management, Inc.*, 3 ALRB No. 14 (1977); affirmed *Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Board*, 144 Cal. Rptr. 149, 160 (1978). We have carefully examined the record in this case and find that the ALO's credibility findings are supported by the record as a whole.

Concerning the four discharges, the General Counsel presented a prima facie case that each was motivated by the employee's union support or activity, based on Respondent's knowledge thereof, its marked anti-union animus, and the circumstances surrounding the discharges. Each employee had worked for Respondent for many years and the Respondent's justifications for the discharges were shifting and inconsistent. In light of the ALO's assessments of credibility, Respondent's admission of untruths and Respondent's admitted fear and distrust of the UFW, we conclude that these justifications were pretexts for the discharges of union supporters.

This Board has not previously considered charges of violations of Section 1153(e) of the Act, which states that it shall be an un-

fair labor practice for an agricultural employer to "refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5...of this part." However, the issues raised in this case have been frequently considered by the National Labor Relations Board with respect to the analogous Section 8(a)(5) of the national labor law. The ALO appropriately applied NLRB precedent to the facts and conclusions of law that Respondent violated Labor Code Section 1153(a) and (e) by its failure to provide information requested by the UFW for the purposes of bargaining, numerous unilateral changes including the discharge discussed above, the change in pay rate and method of payment for irrigators, subsequent wage increases, the granting of housing allowances to the employees hired to replace its discharged milkers, failure to provide a meaningful counterproposal, and refusal to bargain in good faith as discussed by the ALO.

The Remedy

I. The "Make Whole" Remedy for Refusal to Bargain

We are called upon in the present case to construe for the first time that portion of Section 1160.3 of the Act commonly referred to as the "make whole" remedy for an employer's refusal to bargain. The pertinent statutory language states that "[where an unfair labor practice has been found]...the Board...shall issue...an order requiring such person...to take affirmative actions, including...making employees whole, when Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain,..."

By this provision this Board has been granted a power which the NLRB determined in a 3-2 decision it did not possess. [See *Ex-Cell-O Corporation*, 185 NLRB 107, 74 LRRM 1740 (1970), rev'd. and remanded, *sub nom. Auto Workers v. NLRB*, 449 F. 2d 1046, 76 LRRM 2753 (D.C. Cir. 1971.] Both the majority and the dissent in *Ex-Cell-O* agreed, however, that more adequate remedies were needed under the NLRB in cases of employer refusals to bargain. As former NLRB chairman McCulloch observed during the 1976 oversight committee hearings:

> Every Board Member in *Ex-Cell-O* conceded the inadequacy of the Board's 8(a)(5) remedies. The losses to employees, especially in first bargaining situations, who are deprived for 1, 2 or sometimes many more years of their right to be represented are palpable. The weakening of their bargaining agent's status is admitted. The savings to respondent employers from delaying the onset of bargaining for these long periods can be enormous. Until this basic profit from unfair practices is removed, the incentive to mock the statute's promises with lengthy delays is apparently compelling.

Much scholarly comment both before and after the *Ex-Cell-O* decision has argued forcefully to the same end.[2]

There can also be no serious doubt that this history and these concerns were within the contemplation of the drafters of the ALRA, and that this portion of Section 1160.3 was expressly designed in the hope that the course of agricultural labor relations in California would not suffer from a similar lack of authority in this Board.

In her appearance before the Senate Industrial Relations Committee considering the proposed ALRA on May 21, 1975, the then Secretary of the Agriculture and Services Agency Rose Elizabeth Bird, stated in response to a question about the make-whole provision:

> [T]his language was just placed in because there has been a good deal of discussion with the National Labor Relations Act that it ought to be amended to allow the "make whole" remedy, and this is something that the people who have looked at this Act carefully believe is a progressive step and should

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[2] Symposium on NLRB Remedies, 14 Wayne L. Rev. 1039 (1968); Note, "NLRB Power to Award Damages in Unfair Labor Practice Cases," 84 Harv. L. Rev. 1670 (1971); Note, "NLRB Attorney's Fees Awards: An Inadequate Remedy for Refusal to Bargain," 63 Geo. L. J. 955 (1975).

> be taken. And we decided since we were starting anew here in California, that we would take that progressive step. (Hearing on SB 1, 3d Ex. Sess., Senate Ind. Rel. Comm., at 64-65.)

While we have specific authorization for such a remedy, we must consider the scope of its application. Two questions arise directly from the statutory language authorizing the remedy: namely, when is the remedy appropriately applied, and what is included in the term "pay" as it appears in the statute?

The statute directs that the Board may order a make-whole remedy when it "deems such relief appropriate." We have elsewhere concluded that the remedy should be applied in any case in which employees suffer a loss of pay as a result of an employer's refusal to bargain. See *Perry Farms*, 4 ALRB No. 25. decided today.

We consider "pay" as it appears in the statute to refer not only to the wages paid directly to the employee, but also all other benefits, capable of a monetary calculation, which flow to the employee by virtue of the employment relation. In *Ware v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App. 3d 35 (1972), the Court of Appeal found that the scope of the term "wages," appearing in Labor Code Section 200, encompasses all the benefits to which the employee is entitled as a part of his or her compensation, including, for example, bonuses, payments to health and welfare funds, payment of insurance premiums by the employer, employer payments to unemployment insurance funds, and pension plan benefits. Similarly, the National Labor Relations Board, pursuant to its authority to order "back pay" for employees unlawfully discharged or laid off [Section 10(c), NLRA, 29 USC Section 160(c)] has ordered the payment of vacation benefits [*Richard W. Kaase Co.*, 162 NLRB 122, 64 LRRM 1181 (1967)], bonuses [*United Shoe Machinery Corp.*, 96 NLRB 1309, 29 LRRM 1024 (1951)], pension coverage [*Richard W. Kaase Co., supra*], and health and medical coverage [*Knickerbocker Plastics Co.*, 104 NLRB 514, 32 LRRM 1123 (1953)], in addition to basic wages.

We conclude that the term "pay" in Labor Code Section 1160.3 has the same broad content as the term "wages," as applied by

California Courts or "back pay" as construed by the NLRB. The record in this case shows that the UFW has standard contractual clauses providing for health and medical coverage through the Robert F. Kennedy Health Plan, pension benefits through the Juan de la Cruz Pension Plan, and social educational services through the Martin Luther King Fund, as well as clauses providing, where appropriate, for such benefits as overtime pay, shift premiums, paid vacations and holidays, and compensation during travel time and standby time. All such items are encompassed by the term "pay" and it is therefore within our power to order that employees be compensated for their loss.

In fashioning an appropriate implementation of the make whole remedy, we bear in mind certain well-established principles concerning the role of the bargaining obligation and the scope of our remedial powers under this Act. It is the theme of the Act, adopted from the national law on which it is modeled, that peace may be substituted for disruption and strife in California's fields if justice is assured to farmworkers, and the processes of collective bargaining are available to resolve differences between labor and management over terms and conditions of employment.[3] To this end, the Act specifies the rights of farmworkers to bargain collectively with their employers through a representative selected by majority vote. Labor Code Section 1152. An obligation to engage in the bargaining process in good faith is imposed upon employers and certified labor organizations. Labor Code Sections 1153(e) and 1154(c). Violation of this duty deprives individual farmworkers of their rights and frustrates the statutory aim of achieving stable labor-management relationships in California agriculture through the use of this process.[4] Hence the often repeated conclusion of the NLRB and the federal courts that a refusal to bargain in good faith is a violation which strikes at the heart of the Act.

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[3] Section 1 of the Preamble to the ALRA states that "In enacting this legislation the people of the State of California seek to insure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." See also Labor Code section 1140.2.

[4] While the statutory scheme does not require that parties agree to a contract

This Board has broad discretion to devise remedies, provided only that those remedies serve the purposes of the Act. *NLRB v. Seven-Up Bottling Co.*, 344 US 344, 31 LRRM 2237 (1958). Thus, the dissenters in *Ex-Cell-O* advocated a reimbursement order for violations of Section 8(a)(5) of the NLRA so that "employees would be compensated for the injury suffered as a result of their employer's unlawful refusal to bargain, and the employer would thereby be prohibited from enjoying the *fruits of its forbidden conduct to the end, as embodied in the Act, that collective bargaining be encouraged and the rights of injured employees be protected.*" The concurrent purposes of compensating employees and encouraging the practice of collective bargaining form the framework for application of the make-whole remedy. Thus, we seek initially to make employees whole for a deprivation of their statutory rights, and in so doing we must assess the actual monetary value of their loss with reasonable accuracy. In making that assessment, however, we must also strive to encourage the process of collective bargaining, since it is clear that employees may lose far more than wages when there is no contract as a result of a refusal to bargain. Non-monetary improvements in working conditions such as grievance procedures, seniority systems, and provisions for health and safety on the job are not restored to employees by an award of wages, no matter how broadly defined. These benefits must be obtained, if at all, through bargaining; hence our concern that our authority to compensate for loss of wages should be applied so as to spur the resumption of bargaining and that it not become a new means to delay the bargaining process through lengthy compliance proceedings.

We note further that the Board's remedial powers were created not to redress private causes of action, but to implement public

---

or to any particular terms of a contract, it can be shown that good faith bargaining normally results in contracts. Studies have shown that good faith bargaining undertaken without delay results in contracts in a majority of cases following elections by the NLRB. See studies by Professor Phillip Ross cited in *Ex-Cell-O, supra*, at footnotes 47 and 48; a 1975 study of the results of 1970 NLRB election victories by the Industrial Union Department of the AFL-CIO found that 64.45 percent of the units won in that year were brought and remain under contract, and another 13.2 percent were brought under contract for awhile, but are no longer under contract.

policy embodied in the Act. *NLRB v. Seven-Up Bottling Co., supra*; *F. W. Woolworth Company v. NLRB*, 121 F. 2d 658, 8 LRRM 515 (1941). It does not serve the purposes of the Act for the state, in seeking to remedy unfair labor practices which undermine collective bargaining, to so intertwine itself in the details of bargaining that the dictates of the state are substituted for agreement of the parties. It has been the thesis of this law since the enactment of the Wagner Act in 1935 that the practice of collective bargaining should take place free of state interference with the interplay of economic forces and the substance of agreements reached between the parties:

> The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 1 LRRM 703 (1937).

> The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, hopefully, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. *H. K. Porter Co. v. NLRB*, 397 US 99, 71 LRRM 2561 (1970).

In 1947, the Taft-Hartley amendments to the NLRA added Section 8(d) defining the duty to bargain in good faith and containing the proviso that the duty did not "compel either party to agree to a proposal or require the making of a concession." In *H. K. Porter, supra*, the U.S. Supreme Court interpreted this proviso as a limit on the Board's remedial powers, holding that it precluded the Board from ordering the parties to agree to a particular contract item.

Section 1155.2(a) of the ALRA contains language identical to Section 8(d). Under the ALRA, however, that language must be weighed in the remedial context against the explicit authority found in Labor Code Section 1160.3 to assess a make-whole remedy in refusal to bargain cases. *The granting of make-whole authority makes it clear that we are not to read Section 1155.2(a) in such a way that it permits employers who refuse to bargain in good faith to shield themselves from any effective remedy, while retaining economic benefits unlawfully obtained at the expense of their employees.* Instead, we read these provisions, taken together, to authorize the Board to assess a make-whole remedy for periods in which an employer refuses to bargain in good faith and to order good faith bargaining in the future, without imposing a requirement that the parties reach a contract and without dictating any terms of a contract. We also read these two sections as a directive to fashion a make-whole remedy which is minimally intrusive into the bargaining process and which encourages the resumption of that process. "It is the business of the Board to give *coordinated* effect to the policies of the Act." *NLRB v. Seven-Up Bottling Co., sura*, emphasis added.

We have before us a number of suggestions for the calculation of this award, both in this case and in others now pending. Also, a wide range of relevant data on which such an award might reasonably be based is described in the dissenting opinion in *Ex-Cell-O, supra*. We are concerned, however, that the very wealth of available data will give rise to extensive and detailed offers and counter-offers of proof, and will result in protracted litigation at the compliance stages. Such litigation has itself been one of the principal means of legitimizing an otherwise illegal delay in fulfilling the bargaining obligation, and we wish to avoid creating additional opportunities for such delay to the fullest extent possible. It is entirely appropriate and consistent with the purposes of this section to balance the need for reasonable certainty in the amount of damages with the need to minimize delays in bargaining which result directly from use of the Board's processes.

General Counsel and Charging Party in this case jointly presented evidence which would give us a basis for establishing a procedure for calculating wages and fringe benefits in post-

decision compliance proceedings in each case. This evidence establishes a high probability that employees could expect a UFW contract with their employer to contain each of these elements, and further sets forth the contractual formula with respect to each one. In addition, General Counsel and Charging Party submitted an article describing methods devised by the Federal Bureau of Labor Statistics for the costing out of collective bargaining agreements. It is clearly the case that we could calculate a make-whole award by establishing the elements of a hypothetical contract which employees could reasonably have expected to achieve, and thereafter cost out each element of that contract for a particular employer. While this approach might be warranted in particular cases, we think as a general matter that it requires far too much time to be spent in gathering information and making calculations and contains too much potential for dispute over detailed components of the award.

The General Counsel in this case has further followed the *Ex-Cell-O* dissenters in assuming that the formula for a make-whole award in any particular case would be determined in post-hearing compliance stages. In the course of this process the General Counsel would have the burden of establishing elements of the award, and Respondent would have the opportunity to rebut his proof. This approach would almost surely entail a second full-scale hearing in each case, particularly in the initial period of experience with this remedy. At such a hearing, or for that matter in any negotiations to settle the award, the parties and the Board would undertake a detailed inquiry into areas at the heart of the collective bargaining process.

By contrast, legislation now pending before Congress to add the make-whole remedy to the National Labor Relations Act approaches the calculation of the amount of the award far more narrowly than was envisioned in *Ex-Cell-O* in 1970. HR 8410 provides that the award

> Shall be measured by the difference between (1) the wages and other benefits received by such employees during the period of delay, and (ii) the wages and fringe benefits such employees were

> receiving at the time of the unfair labor practice multiplied by the percentage change in wages and other benefits stated in the *Bureau of Labor Statistics, Average Wage and Benefit Settlements, Quarterly Report of Major Collective Bargaining Settlements for 1977-1981* in which the delay began. If the Secretar of Labor certifies to the Board hthat the Bureau has, subsequent to the effective date of the Labor Reform act of 1977, instituted regular issuance of a statistical compilation of bargaining settlements which the Secretary determines would better effectuate the purposes of this subsection than the compilation specified herein, the Board shall, in administering this subsection use the compilation certified by the Secretary.[5]

This formula achieves a reasonable estimate of the actual loss to employees while avoiding the necessity for arguing the relevance of a range of data in each case in a post-hearing setting. We note also that it altogether by-passes litigation of the issue of whether or not a particular employer would have reached contract or agreed to a particular provision. In view of the fact that this issue is created by Respondent's conduct in refusing to bargain, this approach is entirely consistent with the purposes of the Act. cf. *Fibreboard Paper Products Corp.*, 180 NLRB 142, 72 LRRN 1617 (1969), enf'd *sub nom Steelworkers v. NLRB*, 436 F 2d 908, 75 LRRM 2609 (DC Cir. 1970). Respondent in *Fibreboard Paper Products Corp.*, 138 NLRB 550, 51 LRRM 1101 (1962), violated Section 8(a)(5) by failing to bargain about its decision to con-

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[5] The House Report on the H.R. 8410 further described the measure of the award as follows:

> The measure of such damages is an objective one. It consists of the difference between the wages and other benefits received by the employees during the period of delay and the wages and other benefits they were receiving at the time of the unfair labor practice multiplied by a factor which represents the change in such wages and benefits elsewhere in the same industry as determined by the Bureau of Labor Statistics. H. R. Rep. No. 95-637, 95th Cong., 1st Sess. (1977); see also S. Rep. No. 95-628, 95th Cong., 2nd Sess. (1978) on the Labor Law Reform Act of 1978 (S. 2467) at pp. 13-18.

tract out its maintenance operations. During proceedings to determine the amount of backpay owed to the employees terminated as a result of its decision, Respondent contested the formula selected by the Board with the argument that it could not be assumed, and in fact was unlikely, that Respondent would have agreed to that formula if it had bargained. The Board's decision stated:

> In the words of the Supreme Court, "it is not possible to say whether a satisfactory solution could [have been] reached..." Indeed, as the Respondent contends, the Union might not have been able to persuade the Respondent not to contract-out or retain the "Pabco formula." On the other hand, it is by no means clear that the parties could not have reached an agreement in 1959 which would not have eliminated the "Pabco formula." The fact that the Respondent did not give the Union an opportunity to attempt to reach such an agreement was found violative of the Act. Thus, any uncertainty with respect to what wage rates the backpay claimants would have received except for termination was created by the Respondent, which bears the risk of that uncertainty. *Fibreboard Paper Products Corp., supra*, 180 NLRB at 144.

We do not have statistics on wages or collective bargaining settlements in agricultural labor comparable to the BLS data used in the proposed NLRB formula and could not therefore adopt such a precise formula at this early stage. However, we do think it appropriate to try to reduce the number of elements which are subject to dispute in each case, and to simplify the calculation of the amount of the award to each employee.

In addition to these practical advantages, we think this approach is preferable in terms of its impact on the bargaining process. We prefer to leave to the parties the tasks of costing out and weighing one particular provision against another. We think that an award based on a more general estimate of the cost of a contract allows more room for this negotiation process to be worked out in the

manner most appropriate in each case, because it does not inject the Board into the process of assessing alternatives. Furthermore, since such an award is based to an extent upon generally applicable data drawn from employers who bargained in good faith, it will reflect the settlements they have reached. *This will tend to eliminate any competitive advantage obtained by an employer who bargains in bad faith over employers who pay higher labor costs because they complied with the law, thereby further reducing "the incentive to mock the statute's promises..."*

We therefore shall proceed on the basis of these principles to calculate the amount of the make-whole award as follows:

A. The Duration of the Make-Whole Period

The appropriate period for the application of the make-whole remedy is from the date of the first refusal to bargain until Respondent begins to bargain in good faith and thereafter bargains to contract or impasse. Application of the remedy during this period directly deprives Respondent of the immediate economic benefits to be gained by continuing its misconduct, and serves to forestall those effects of delay so destructive to the union's ability to bargain. Again as noted in footnote 51 of *Ex-Cell-O, supra*,

> It is argued that the remedy contemplated should not be computed from the beginning of the Employer's refusal to bargain since collective-bargaining contracts are usually not agreed upon immediately upon the inception of a duty to bargain. However, an order that liability shall cease when the Respondent *commences* to bargain, not when an agreement is achieved, negates any such argument for a delayed date of liability. For, the period between commencement of bargaining and agreement would be provided for at the end of the liability period rather than at the beginning. In addition to providing beginning and ending dates more precise and less conjectural, a computation on such a basis has the added advantage of permitting the employer to accept its basic responsibili-

> ty to bargain and thereby toll the accrual of reimbursable losses and leave it free actually to bargain without added pressure to reach a contract in order thereby to minimize its monetary liability, thus fostering collective bargaining without compelling agreement.

The General Counsel has argued for a procedure which would involve payment of make-whole sums into an escrow account on a regular basis until contract or impasse is reached. At that point, any amounts paid into the account during periods of good faith bargaining would be refunded to the employer and the rest of the funds distributed to the employees. General Counsel argues that the need to make such continuing payments even during periods of good faith bargainng will act as a necessary spur to the bargaining process. At this point we see no need for a procedure which would have a substantial continuing impact on the ongoing bargaining process. Not until we have monitored the impact of this remedy can we draw any conclusion regarding its effectiveness. Changes may be appropriate at some future time. For the present, then, we leave the details of manner and timing of payment of Respondent's liability to compliance procedures supervised by the Regional Director, in the same manner as in back-pay proceedings.

B. Calculation of Basic Wage Rate

As noted above, we have no source of data on wages and fringe benefits paid to California farmworkers under union contract which is comparable to the data specified in H.R. 8410. Nor is it likely that such data will be available from any official source in the immediate future. However, the data submitted in this case provide a reasonable basis for calculation of a basic wage rate which employees could expect to receive under UFW contract.

Of the total number of 57 UFW contracts in effect as of the time of this hearing, there are 37 which were negotiated pursuant to ALRA certifications and concerning which we have relatively complete data. These contracts cover a wide range of crops, and vary considerably in size of work force. With respect to basic wage

rates, a consistent pattern emerges irrespective of these variations in the type of agricultural enterprises. In 30 of 37 contracts the general field and harvest labor wage rate was $3.10 per hour during the first year of contract and $3.225 during the second year. The average of all 37 contracts was $3.13 during the first year and $3.26 the second year. During the third year, 32 out of 35 contracts specified a rate of $3.35 per hour with an average for all 35 of $3.38, while two contracts contained no provision for a third year. Thus, it is clear from these data that the most predictable result of the UFW's bargaining efforts during this period was the establishment of a nearly uniform basic wage rate statewide, irrespective of the pre-contract wage rates at particular employers.[6]

We also note that these 37 contracts were concluded within a time frame which is relevant to our determination of a make-whole award. All 37 were concluded within 12 months of the UFW's certification with respect to each employer and 36 of the 37 contracts were concluded during the 12-month period following the UFW's certification on December 5, 1975, as bargaining agent for respondent herein. Based on this evidence it is reasonable to assume for purposes of calculating the make-whole amount that Respondent's conduct deprived employees of the benefits of a similar contract concluded during a similar period. The presumption embodied in the statute that the year following certification both will and should be the period of most fruitful bargaining lends further support to our reference to contracts concluded during this period. Labor Code 1156.6, *Ray Brooks v. NLRB*, 348 U.S. 98, 35 LRRM 2158 (1954); *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785, 49 LRRM 1854 (1962); see also *Kaplan's Fruit and Produce Co.*, 3 ALRB No. 28. Particularly in a first bargaining situation where Respondent's refusal to bargain in good faith spans this protected period of the certification year, it is appropriate

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[6] The evidence shows an average increase over pre-contract wage rates of 11.73 percent for these 37 contracts. However, where the employer was already paying a pre-contract wage in the vicinity of $3.10 per hour, the negotiated increase was markedly less than this average; where the employer's pre-contract wage was substantially below $3.10, it rose by a percentage greatly in excess of the average. To adopt an average percentage in the face of this evidence would be inequitable.

to look to contracts concluded during this period as a measure of employee loss.

We conclude that the average negotiated wage rate under these first contracts is a reasonable measure of the compensation which employees could have expected to gain in the form of straight-time hourly wages as a result of the UFW's efforts on their part during the period measured by the Respondent's refusal to bargain. Accordingly, we shall order that Respondent make its employees whole for the net difference between its basic wage rate and the average negotiated wage of $3.13 per hour reflected for this period. We note, however, that this reflects the lowest wage rate negotiated in UFW contracts. The UFW produced testimony that similarly uniform patterns appear with respect to more specialized and highly paid job classifications, such as "mechanics." In addition, this figure of $3.13 per hour does not reflect the generally higher average hourly earnings obtainable by the more skilled employees working under a piece-rate system.[7]

We could presumably obtain data concerning more highly paid job classifications and subject it to the same analysis described above. However, in order to apply this data in the calculation of an award, we would have to classify the employees in each case according to categories set forth in a hypothetical UFW contract. Respondent's wage structure herein currently reflects differentials among some of its employees, which were apparently not established according to any systematic criteria. Its employees could reasonably have expected that some of these differentials would be eliminated, and new ones created pursuant to a contract as

[7] The Board has conducted its own examination of 19 UFW contracts currently on file with the Department of Industrial Relations. Those 19 overlap somewhat with the 37 under consideration here. Examination of those contracts reveals that piece-rates commonly appear in UFW contracts and are embodied in supplemental agreements to those contracts, and that the contracts prescribe higher wage rates for a wide variety of specialized jobs, such as mechanics, irrigators, loaders and others. It is not possible simply by examining these contracts to estimate average hourly earnings under the piece-rates. Statistics published in *Farm Labor and Wage Rates* by the California Crop and Livestock Reporting Service (U.S. Dept. of Agriculture and Calif. Dept. of Food and Agriculture) indicate that piece-rates produce higher hourly earnings than straight hourly rates.

a result of systems for determining seniority and job classifications. Notwithstanding the clear impact of such changes on the income of particular employees, we do not consider these potential contract items to be "pay" within the meaning of Section 1160.3. Any attempt to project the application of such systems to particular employers takes us rather far afield from our basic task here which is to compensate employees for loss of pay. Rather than engaging in such speculation, we shall order that the award be calculated in such a way as to assure that employees currently earning higher rates will be made whole to the same extent as other employees. This shall be accomplished by assuming that the average negotiated wage of $3.13 per hour is equivalent to Respondent's lowest basic wage rate. Each employee who received during the make-whole period a differential above the Respondent's base wage shall be credited with a proportional increment above the make-whole base rate. For example, the make-whole rate for an individual earning 10 percent above the employer's basic prevailing wage shall be $3.13 per hour, plus 10 percent, or a total make-whole wage rate of $3.44 per hour. The value of fringe benefits will, of course, have to be added to this figure to achieve the full make-whole hourly rate. In future cases, if we found a close correspondence between a respondent's job classifications and those specified in UFW contracts, or if wage data constituting averages from all wage categories become available to us, we might take another approach.

Before proceeding to consider the calculation of fringe benefits, we note several considerations related to the applicability of this wage data to this Respondent's operations. Respondent operates a dairy, and none of the 37 contracts discussed herein is a dairy contract. Respondent specifically excepted to the ALO's finding that dairy agricultural work is similar to other agricultural work for purposes of the make-whole remedy on the grounds that he had earlier found the milkers to be "skilled" workers when considering their discharges. We do not think these two findings are inconsistent. The ALO characterized the milkers as skilled in the context of evaluating Respondent's proffered justifications for their discharges. Testimony showed that Respondent's non-supervisory workforce consisted of two milkers, a relief milker, and from 12-14 other employees who performed a variety of

general agricultural tasks. Chuck Adam, a partner in Adam Dairy and generally involved in its operations on a daily basis, testified that the work on the ranch, including milking, was "all fairly skilled." He testified that he could demonstrate the jobs of tractor driving or pipe-moving in about 15 minutes, but that it would take a new employee "about a month" before he would get to be good at it. To replace its discharged milkers, Respondent hired one employee with previous experience as a milker, and a second with none, with the intent that the first would train the second. The experienced employee was not working as a milker at the time he was hired. This testimony is consistent with that of UFW witness Gilbert Padilla, who testified without contradiction that dairy workers come from the same general labor pool and receive similar pay to other agricultural workers. We therefore conclude that this record adequately supports the application of the general field and harvest labor wage rate in UFW contracts to Respondent's operations for remedial purposes. Moreover, under the method we have adopted for taking account of wage differentials, the only ones required in Respondent's operations will be those previously instituted by Respondent itself.

C. Calculation of Fringe Benefits

As indicated above, we construe the term "pay" broadly to include all benefits, capable of a monetary calculation, which accrue to the employee as an element of his or her total compensation. In the preceding section we set forth the foundation for our calculation of the basic wage to be awarded herein. We must now turn to an analysis of the fringe benefit aspect of employee compensation.

We begin first with the concept that fringe benefits are an element of the total compensation paid by the employer to the employee. In some instances this compensation is diverted to deposit in funds which provide benefit to the employee through an administered plan. In other forms it is paid directly to the employee; for example, overtime, vacation pay, holiday pay, standby pay, etc. Irrespective of the form which the benefit takes, however, it is ultimately calculable in terms of a dollars per hour figure. Because these various benefits are employee compensa-

tion, and hence pay within our broad definition, it is our intent to order that their value be paid directly to the workers involved as an aspect of the gross make-whole award. This, of course, means that we will not order that any of these sums be paid directly to the various benefit plans which the evidence indicates the UFW negotiates, on a virtually uniform basis, in its contracts. At the present time a direct payment to the individual contains a promise of ease of administration and Board control not matched by this other approach.[8] Moreover, as we currently view the problem, it avoids any necessity for Board evaluation of the merits of any particular fund as a depository for employee monies. That is ultimately a matter for negotiation by the parties.

There remains the problem of deriving the amount of the award. Our goal has been to devise a method which will avoid lengthy post-decisional proceedings, will provide an effective redress for employee losses and will promote the course of good faith negotiations between the parties in the future. In part I-A, above, we have looked to the record evidence and determined that the effect of the UFW's bargaining power in the first-time contracts in the relevant period was the achievement of a fairly uniform basic field and harvest wage rate, statewide, irrespective of crop, of $3.13 per hour. This same evidence discloses that the typical contract negotiated by the UFW is a fully developed type, modeled closely upon those in effect in the industrial sector. It contains a variety of benefit provisions beyond the basic wage structure, including, for example, overtime and night shift differentials, vacation and holiday pays, standby time, travel time, paid bereavement, and jury duty leave.

There are several methods by which we might proceed to derive a fringe benefit figure. One would be to apply the typical UFW contract, provision by provision, to the Respondent's operation. To do so would require a massive review of the nature of the farming operation and a determination whether, for example, stand-

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[8] In the realm of the distribution of compensatory monetary awards, the NLRB has traditionally been granted wide discretion to fashion solutions tailored to the particular case. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 US 177, 8 LRRM 439, fn. 7 and accompanying text (1941); *F. W. Woolworth v. NLRB*, 121 F 2d 658, 8 LRRM 515 (2d Cir. 1941); *NLRB v. Seven-Up Bottling Company, supra.*

by and travel pay would apply. We would also have to determine the applicability of night shift differentials. The structure of the vacation pay provision is such that we would have to analyze each employee's work history to determine the extent of the vacation entitlement on a case-by-case basis. In some instances this approach might require the Board to choose between one of several variations in the provision in order to apply it to the Respondent. In our view, such a process would be unwieldy, time-consuming, and not conducive to fostering a future course of good faith bargaining between the parties. We are also mindful of our obligation to refrain from writing an agreement for the parties.

In order to avoid these problems, we have sought a more generalized approach to this question. Among other sources, we have taken notice of the publications of the U.S. Department of Labor, Bureau of Labor Statistics (BLS), for an approach to the issue which would meet our needs. In a 1977 publication entitled *Employee Compensation in the Private Nonfarm Economy, 1974* (BLS Bulletin 1963), the Bureau tabulated data regarding the results of its national surveys of the composition of employee compensation during the period 1966 to 1974. The data shows clearly that during this period of time fringe benefits markedly increased their role in the total compensation paid the employee. Bulletin 1963, *supra*, Chart 2, p. 6. See also Table 38. When the compensation paid to non-office employees in union and non-union establishments is compared, a sharper pattern of diversion of compensation into fringe benefits is revealed. Table 20. In 1974, pay for straight time worked constituted, for all industries, 76.3 percent of total compensation received. Fringe benefits therefore represented the remainder of such compensation. The 1974 figures concerning the non-manufacturing sector show straight time pay representing a slightly higher percentage of total compensation. The fringe benefits in that segment of the economy therefore represent a smaller percentage of the total compensation.

From this data we have identified these principles. In the eight year period 1966-1974 the clear trend was for fringe benefits to represent an increasingly larger percentage of the total compensation paid to employees. On the average, over the entire period, fringes increased their proportion of total compensation at a rate

of slightly more than one-half percent per year. In the non-manufacturing sector, pay for straight time worked has historically represented a higher proportion of the total compensation paid employees than in the manufacturing sector. Finally, one measurable consequence of a collective bargaining contract has been the receipt of a greater proportion of total compensation in the form of fringe benefits.

As the result of our consideration of the evidence before us, our notice of the BLS data and in order to promote the objectives described above, we have determined to premise the make-whole award for fringe benefits on the following basis. Accepting the figure of $3.13 per hour as the basic straight-time make-whole wage (see part I-B above), we assign to it a value of 78 percent of the total compensation package.[9] The minimum total make-whole wage per employee per hour, shall therefore be $4.01. This sum is derived in the following manner:

$$\$3.13 = .78X \text{ (where X equals the total compensation)}$$

$$\frac{\$3.13}{.78} = X$$

$$X = \$4.01$$

In the year 1976, then, each employee shall receive the net difference per hour between this figure and the actual total hourly value of all monetary benefits actually received from the company. This latter figure shall be composed of the total net pay

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[9] We take this figure from the 1974, non-manufacturing straight time pay category of the BLS study, Table 38. The non-manufacturing category is most readily compared to the agricultural industry. It is relatively lower paying, and tends by and large to be characterized by labor-intensive, rather than capital-intensive operations.

Although the overall trend would indicate that in the year 1976 this figure would be approximately 1 percent lower (77%), we have not adopted that figure. This is largely because we recognize that in the agricultural industry vacation and paid holiday benefits are less than those prevailing in the non-farm economy, hence they represent a smaller percentage of the fringe benefit compensation.

received by each employee during the make-whole period plus any sums paid by the employer for the benefit of employees calculated on an hourly basis. For example, the Respondent shall be credited for its share of contributions to funds to which it directly contributes for the employees' account.

We recognize fully that in deriving this fringe benefit figure we are venturing into a somewhat novel remedial area. Because of the Respondent's misconduct in unlawfully refusing to bargain in good faith with the certified representative of its employees, we are required to consider imprecise data. Moreover, our inability to effect the perfect remedial order does not negative our obligation to enter an order which nonetheless effectuates the purposes and policies of the Act. As the Court said in a related context (back pay calculation for discharged employees):

> ...Even in private litigation, the courts will not impose an unattainable standard of accuracy. Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasonable conclusion. (Citations omitted.)
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> *F. W. Woolworth Co. v. NLRB*, 121 F. 2d 658, 8 LRRM 515 (2nd Cir. 1941); cited with approval in *Bigelow v. RKO Radio Pictures*, 327 US 251, 265 (1945).

II. Additional remedies for refusal to bargain in good faith.

The make-whole remedy for refusal to bargain takes its place among a variety of remedies which have been tailored to fit particular variations of this violation. We modify the ALO's order to include the following provisions which are appropriate to the facts of this case.

A. Unilateral changes.

Respondent in this case unilaterally changed its method of paying for pipe-moving and other general labor from an hourly rate

to a combination of hourly and piece rates. While the ALO found, and we agree, that the offer to Luis Chavez of a job consisting entirely of pipe-moving on a piece-rate basis constituted a reduction in his wages, we do not think it is clear on this record that the change to a combination of hourly and piece rates for pipe moving and other work operated to the detriment of Respondent's other employees. If the employees were adversely affected by the change, it would be appropriate to order that it be rescinded. Accordingly, we shall order that the changes be rescinded, if the union, as the exclusive representative of the affected employees, so desires; and in addition, that Respondent make available to the union, upon request, all records necessary and relevant to assess the alternatives available to the employees. *Unoco, Apparel, Inc.*, 215 NLRB 89, 88 LRRM 1238 (1974); *Idaho Fresh-Pak-Inc.*, 215 NLRB 676, 88 LRRM 1207 (1974). If the employees desire revocation of the changes, Respondent shall make them whole for any losses which resulted from such changes.

B. Extension of certification year.

The NLRB routinely extends certification where there has been a refusal to bargain during the certification year; see for example *Big Three Industries, Inc.*, 227 NLRB No. 243 (1977), *Whitney Stores*, 185 NLRB 625, 75 LRRM 1464 (1970); *Hartford Fire Insurance Co.*, 191 NLRB 563, 77 LRRM 1581 (1971). We think this practice is equally appropriate under the circumstances of our cases. See *Kaplan's Fruit and Produce Co.*, 3 ALRB No. 28 (1977). Accordingly, in view of Respondent's refusal to bargain during the initial certification year, and in order to insure that these employees will be accorded the services of their selected bargaining representative for the period provided by law, we shall extend the union's initial certification for one year from the date on which Respondent commences bargaining in good faith with the union.

C. Refusal to provide information.

Since Respondent in this case refused to provide information which was relevant and necessary to the union to carry out its duties as bargaining agent for its employees, we shall specifically order that it do so.

III. Award of costs and attorney's fees.

The ALO ordered Respondent to pay attorney's fees to the Charging Party in connection with its conditional bargaining defense on the basis that that defense was frivolous. He defined a frivolous defense as one which "obviously lacks merit, is not debatable, and not one which falls simply upon the Administrative Law Judge's resolutions of conflicting testimony." In its conditional bargaining defense, Respondent's theory was that the UFW negotiator, Peter Cohen, insisted on reinstatement of the four discriminatees before the union would engage in further negotiations. Respondent's witnesses testified that Cohen said exactly that in the meeting on May 18, 1976, and in alleged telephone conversations thereafter, while Cohen testified to the effect that he insisted only that their status be discussed in the course of bargaining. Respondent's version poses something more than a frivolous defense. While the record clearly supports the ALO's resolution of this conflicting testimony in favor of Cohen, his resolution is central to Respondent's defense. Accordingly, we reverse the ALO's award of attorney's fees to the Charging Party.[10]

ORDER

Respondent Adam Dairy (Rancho Dos Rios), its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the UFW, or any other labor organization, by discharging, laying off, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153(c) of the Act.

(b) Refusing to bargain collectively in good faith with the

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[10] The General Counsel excepted to the ALO's failure to award attorney's fees to it. Since we do not characterize Respondent's defenses as frivolous or debatable, such an award is not warranted in this case. *Western Conference of Teamsters, et al.*, 3 ALRB No. 57 (1977).

UFW as the exclusive representative of its agricultural employees as required by Labor Code Sections 1153(e) and 1155.2(a), and in particular: (1) refusing to meet at reasonable times and confer in good faith and submit meaningful bargaining proposals with respect to wages, hours and other terms and conditions of employment; (2) refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining; and (3) making unilateral changes in terms and conditions of employment of its employees without notice to and bargaining with the UFW.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them by section 1152.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer to Luis Chavez, Ramiro Cardenas, Ruben Quintero and Jesus Magana, immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their termination pursuant to the formula used in *Sunnyside Nurseries, Inc.*, 3 ALRB No. 42 (1977).

(b) Upon request, bargain collectively with the UFW as the exclusive representative of its agricultural employees, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Furnish to the UFW the information requested by it relevant to the preparation for and conduct of collective bargaining.

(d) Upon request, furnish the UFW with all records necessary and relevant to its determination of whether to request restoration of the method and rates of pay in effect prior to Respondent's unilateral changes in method and rates of pay for pipe-moving work.

(e) Revoke the unilateral changes in method and rates of pay

for pipe-moving work, and restore those rates of pay in effect prior to these changes, and make employees whole for any losses they may have suffered by reason of the unlawful changes, if the UFW, as the exclusive representative of Respondent's employees, so requests.

(f) Make whole those employees employed by Respondent in the appropriate bargaining unit at any time between the date of Respondent's first refusal to bargain at about January 19, 1976,[11] to the date on which Respondent commences collective bargaining in good faith and thereafter bargains to contract or impasse, for any losses they may have suffered as a result of the aforesaid refusal to bargain in good faith, as those losses have been defined in Part I of this decision.

(g) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due employees under the terms of this Order.

(h) Execute the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereafter.

(i) Post copies of the attached notice for 90 consecutive days at places to be determined by the Regional Director. Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

(j) Mail copies of the attached notice in appropriate languages, within 30 days from receipt of this Order, to all employees employed between January 15, 1976, and the date on which Respondent commences to bargain in good faith and thereafter bargains to contract or impasse.

(k) A representative of Respondent or a Board agent shall

[11] This was the date of the first phone conversation between Chavez and Adam Dairy following his return from vacation, in which Respondent did not permit Chavez to resume his work as usual.

MEMBER McCARTHY, Concurring:

I concur in the result of the majority opinion insofar as it deems make-whole relief a proper remedy under the facts and circumstances of this case. However, for the reasons stated in my concurring opinion in *Perry Farms, Inc.*, 4 ALRB No. 25 (1978) decided today, I cannot agree with my colleagues' view that every case of refusal to bargain warrants application of the make-whole remedy.

Dated: April 26, 1978

JOHN P. McCARTHY, Member

MEMBER HUTCHINSON, dissenting in part:

I concur in all respects with the majority opinion except for its reversal of the ALO's award of attorney's fees and litigation costs to the Charging Party.

While the ALO may have mischaracterized one of Respondent's defenses, the record as a whole justifies his recommended order.

In my view a litigation posture which utilizes spurious justifications, pretexts, and untruthful testimony to explain away flagrant violations of the law can logically be labelled as "frivolous." Respondent wins no redemption, in this case, by the fact that one, or a few, of its defense positions raised debatable issues.

DATED: April 26, 1978

ROBERT B. HUTCHINSON, Member

read the attached notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

(l) Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ordered that the certification of the United Farmworkers of America, AFL-CIO, as the exclusive bargaining representative for Respondent's agricultural employees be extended for a period of one year from the date on which Respondent commences to bargain in good faith with said union.

It is further ORDERED that all allegations contained in the complaint and not found herein are dismissed.

Dated: April 26, 1978

GERALD A. BROWN, Chairman

HERBERT A. PERRY, Member

RONALD L. RUIZ, Member

APPENDIX B

PERRY FARMS
4 ALRB NO. 25 (1978)
DECISION AND ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD

April 26, 1978

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

PERRY FARMS, INC., Case No. 76-CE-1-S

Respondent 4 ALRB No. 25

and

UNITED FARM WORKERS
OF AMERICA, AFL-CIO,

Charging Party

DECISION AND ORDER

On March 10, 1977, Administrative Law Officer (ALO) Ronald M. Telanoff issued the attached Decision. The General Counsel and Respondent each filed exceptions and a supporting brief and the General Counsel filed a brief in opposition to Respondent's exceptions. By leave of the Board, the Western Grower's Association filed a brief *amicus curiae* regarding the Board's implementation of the make-whole remedy for refusal to bargain provided in Labor Code Section 1160.3, to which the General Counsel filed a brief in response.

The Board has considered the record and the attached Decision in light of the exceptions and briefs of the parties and the *amicus* brief, and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order as modified herein.

The complaint alleged, and the ALO found, that the Respondent, since on or about January 13, 1976, has failed and refused to bargain collectively in good faith, in violation of Section 1153(e) and (a) of the Act, with the United Farm Workers of America, AFL-CIO (UFW), by its failure to provide bargaining information requested by the Union and its refusal to meet with the Union

for the purpose of bargaining, although requested to do so. The UFW had previously been certified as the exclusive representative of all of the agricultural employees of the Employer in San Joaquin County in Case Number 75-RC-2-S. The ALO found also that Respondent had independently violated Section 1153(a) of the Act on August 30, 1975, by provoking a fight with a UFW organizer, by interfering with the organizer's attempts to communicate with workers and by damaging UFW property (authorization cards), all of which conduct occurred in the presence of agricultural employees.[1]

In its answer to the complaint, Respondent raised, *inter alia*, the defense that there was no proper election conducted among its employees, that the certification was invalid, and that it was therefore under no duty to bargain with the Union. Although the ALO received a substantial amount of testimony with respect to representation issues, he concluded that the certification was not subject to attack in this unfair labor practice proceeding. While we agree with the ALO's conclusion, we wish to clarify its rationale.

Under NLRB precedent, in the absence of newly discovered or previously unavailable evidence or extraordinary circumstances, a respondent in a refusal to bargain proceeding may not litigate matters which were or could have been raised in the prior representation proceeding. *See, e.g., King's Markets, Inc.*, 233 NLRB No. 60 (1977). This broad proscription against relitigation of representation issues in related unfair labor practice proceedings has been

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[1] Respondent takes exception to these findings on the procedural ground that the events were not included in a charge or a complaint filed within the six-month limitation of Section 1160.2 of the Act. The law is clear, however, that the statutory limitation is not jurisdictional, but must be the subject of an affirmative defense. *See, e.g., Chicago Roll Forming Co.*, 167 NLRB 961, 971, 66 LRRM 1228 (1967), enf'd. 418 F.2d 346, 72 LRRM 2683 (7th Cir. 1969). Respondent failed to raise the defense at the hearing, and indeed, presented rebuttal witnesses concerning these incidents. The substance of this conduct was therefore fully litigated by the parties, was properly before the ALO for decision, and the Respondent's failure to raise the statutory limitation constituted a waiver of the defense. *Shumate v. NLRB*, 452 F.2d 717, 78 LRRM 2905, 2908 (4th Cir. 1971). This portion of Respondent's exception is rejected. The substantive aspects of Respondent's exception are discussed *infra*.

consistently supported by the courts since the earliest days of the NLRA. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162, 8 LRRM 425 (1941). We view this doctrine as also appropriate to proceedings under the ALRA. It expresses a proper balance between the statutory goals of achieving finality and stability in representation matters and the interest of the Board and the parties in assuring that there has been a full and fair opportunity for investigation of facts bearing on the propriety of the election and certification process. We shall hereafter apply it in our cases.

We take administrative notice that Respondent's objections to the election were dismissed, *inter alia*, because of its failure to comply with Section 1156.3(c) of the Act and Section 20365(a) of the Board's regulations, regarding the proper and timely filing, service and contents of objections. It is clear, however, that Respondent had the opportunity to file, and thereafter to litigate, proper objections to the conduct of the election and/or to conduct affecting its results. This is all that the law requires. That the objections were ultimately dismissed on procedural as well as substantive grounds is immaterial. In either instance the Respondent may not litigate the representation issues in a subsequent refusal to bargain proceeding. *Deming Division, Crane Co.*, 218 NLRB 130, 89 LRRM 1638 (1975); *Douglas County Electric Membership Coop.*, 148 NLRB 559, enf'd. 358 F.2d 125, 61 LRRM 2679 (5th Cir. 1964).

At the hearing the ALO granted the General Counsel's motion to amend the complaint to allege that Ernest Perry, Perry Farms, Inc., and Lathrop Farm Labor Center, Inc., (hereafter LFLC), constitute a single employer for the purposes of the Act. The ALO so found in his Decision. Respondent has taken exception on several grounds: (1) that the Board never acquired jurisdiction over either Ernest Perry as an individual or over LFLC, in that they were not served with a copy of the charge or the complaint; (2) that as a matter of law the ALO erred in his finding that the three entities were one for purposes of the ALRA. We find that neither of these exceptions has merit.

Upon the facts of this case, largely as admitted by Respondent at trial, it is clearly established that Ernest Perry, Perry Farms,

Inc., and LFLC are a single integrated enterprise and comprise one employer for the purposes of this Act. Ernest Perry owns all stock in, and is President of, Perry Farms, Inc. Leonardo Loduca is its Vice-President. Perry and Loduca each own 50% of the stock of LFLC. Again, Perry is the President and Loduca the Vice-President. Both LFLC and Perry Farms, Inc., share the same address and same telephone number. Ernest Perry makes all of the material decisions for both entities. He controls and administers, and makes the labor relations decisions and policy for both. Perry also establishes and negotiates the deals in which the two corporate entities participate. The record discloses that one or the other of these entities variously functioned under Perry's personal direction during 1975 as an owner of growing crops, as a labor contractor, and as a custom farmer and harvester, and that it was Perry who determined in which capacity they functioned. At the time the petition herein was filed, for example, LFLC, which usually operates as a labor contractor according to Perry, was in fact harvesting tomatoes for its own account. It was therefore an agricultural employer within the meaning of the Act at that time.

On the basis of the above and the entire record herein, we adopt the ALO's finding that Ernest Perry, Perry Farms, Inc., and LFLC are a single integrated enterprise and constitute one employer for the purposes of the Act. *See, e.g., Marsal Transport, Inc.* 199 NLRB 689, 82 LRRM 1094 (1972); *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962, 968-69, 75 LRRM 1226 (1970), enf'd. and modified on other grounds *sub nom. NLRB v. Tragniew*, 470 F.2d 669, 81 LRRM 2336 (9th Cir. 1972). Having established that the three entities are legally one, it follows that the failure to name as respondents, or to serve a charge and/or complaint upon, Ernest Perry or LFLC is not material herein, and we shall enter a remedial order which applies to all three. *Barrington Plaza and Tragniew, Inc., supra*; *Esgro, Inc., and Esgro Valley, Inc.*, 135 NLRB 285, 49 LRRM 1472 (1962).

Respondent raises several exceptions going to the constitutionality of unfair labor practice proceedings under the Act. The first is that the ALRA unconstitutionally confers judicial power upon this agency in violation of Article III, 3 of the California Constitution. The second is that the review procedure set forth in

§ 1160.8 of the Act unconstitutionally limits the power of the courts to review the findings of the agency. As both of these contentions have recently been resolved in this agency's favor by the Fifth District Court of Appeal in *Tex-Cal Land Management, Inc., v. Agricultural Labor Relations Board*, 5 Civ. 3395 (2/21/78) we find these exceptions to be without merit.

Other § 1153(a) Violations

The ALO found that on August 30, 1975, Respondent, by Ernest Perry, violated the Act by provoking a fight with a Union organizer, by interfering with the Union's communication with workers, and by damaging or destroying union property. This conduct occurred in the presence of Respondent's agricultural employees. The ALO refused to find that the assault itself was a violation of the Act. The General Counsel has excepted to this conclusion, and to other language utilized by the ALO which he contends may create the impression that resort to law enforcement officials is an appropriate employer response irrespective of the circumstances in which it occurs.

As regards the latter issue, this Board has clearly indicated to the contrary in several cases. *See e.g., Tex-Cal Land Management, Inc.*, 3 ALRB No. 14 (1977); *D'Arrigo Bros. Company*, 3 ALRB No. 31 (1977). Unlawful employer interference with employee rights is not made lawful by the nature of the medium through which the violator chooses to act. Any inference to the contrary which may be based on the ALO's language is hereby expressly rejected.

We agree with the General Counsel that the ALO's distinction between the Respondent's liability for provoking the fight and the fight itself is not a tenable one under the facts of this case. We find no merit in Respondent's argument that finding a violation requires a showing that the organizers were lawfully on the property.

In *Tex-Cal Land Management, Inc., supra*, we held that the Act proscribes resort to violence of precisely the sort revealed in this case in the presence of agricultural employees. Only a showing of imminent need to take such action in order to protect tangible

property interests or persons would justify such conduct. This holding was premised on our consideration of federal labor experience and on the special concern of the Legislature, as stated in the ALRA's preamble, that an end be made to the unstable and volatile condition which historically had existed in California agricultural industry. Those principles apply here. Ernest Perry chose to vindicate his claims of right in this case by shouting at the organizers, pushing and shoving them, throwing their authorization cards on the ground, precipitating an altercation in which the organizer's mustache was partially pulled off, and displaying an axe handle in a threatening manner. This entire course of conduct, including the fight itself, was violative of the Act, and we so find. We shall therefore modify the remedial order accordingly.

THE REMEDY

I. The Make-Whole Remedy for Refusal to Bargain

We have elsewhere reviewed the history and background of the make-whole remedy for refusal to bargain. *See Adam Dairy*, 4 ALRB No. 24 (1978), decided today. We adopt that discussion here and, most specifically, the conclusion that the ALRB has been granted the remedial power which the National Board determined it did not possess.

We turn next to a consideration of when the remedy should be applied. The statute directs that the Board may order a make-whole remedy when it "deems such relief appropriate." The ALO found that the make-whole remedy was appropriate on the facts of this case. The essence of his analysis and his failure to characterize the Respondent's refusal as, for example, "flagrant," "willful," or "frivolous" implies that he would apply the remedy wherever a refusal to bargain is made out. This is clearly the General Counsel's position as well. The Respondent and *amicus*, however, both argue that federal precedent limits the applicability of the remedy to only those cases where the employer's conduct can be shown to be "a clear and flagrant refusal to bargain for patently frivolous reasons."[2]

[2] Respondent's additional argument is that the remedy cannot be applied without

In our view, the appropriateness of this remedy is ultimately to be determined by an analysis of the competing interests affected and a balancing of their respective weights in light of the goals and policies of the Act. This process leads us to conclude that the make-whole remedy is apropriate whenever an employer has been found to have refused to bargain in violation of Section 1153(e) and (a) of the Act and the employees have suffered losses of pay as a result. For the purpose of analysis at this juncture, the fact of loss to the employees may be presumed. *Cf. NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178, 60 LRRM 2578 (2nd Cir. 1965).

In the preamble to the Act, the Legislature set forth certain basic principles to which we must turn for guidance in our task of construing and implementing this law. The Legislature stated that by enacting the law the people of California sought to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." Preamble, Section 1, ALRA. The statute was further designed, so the Legislature guides us, to ". . . bring certainty and a sense of fair play" to the employer/employee relationship in agriculture. Preamble, Section 1.5, ALRA. Finally, in Section 1140.2 of the Act, we find the following statement of the intent of the legislation:

> It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or pro-

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a finding that "but for" the employer's refusal to bargain a contract would have been signed. This position is erroneous. It elevates the Respondent's own unlawful conduct (the refusal to bargain) to the status of a virtual bar to any implementation of the remedy. Such a result has no basis in law or equity. *See also* the discussion on this point in *Adam Dairy, supra*, slip op. at 14-15.

> tection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.

The above principles show clearly that when an employer refuses to bargain with the certified representative of its employees it commits an act which strikes at the very heart of the system of labor-management relations which the Legislature sought to create. It has thereby deprived the employees of their statutorily created right to be represented by their Board-certified agent in the negotiation of the wages, hours, and other terms and conditions of their employment. The employees suffer this same loss whether the employer's refusal to bargain is designed solely to procure review in the courts of the underlying election issues or is of the flagrant or willful variety. This identity of harm is the crux of the question concerning when the remedy ought to be applied. As between the innocent employees and the employer which, having once had the full opportunity to litigate meritorious representation objections before the Board, now seeks a second review in the courts by a refusal to bargain, traditional principles of equity and the goals and policies of the Act require that the employer bear the actual burden of its own conduct. Where the employer's conduct is willful or flagrant, there can be no question that the same result must apply.[3]

A contrary conclusion would create a situation in which *only* the employer would be the ultimate beneficiary of its refusal to

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[3] Respondent and the *amicus* argue that the make-whole remedy would be "punitive" in any case not of the "flagrant" or "willful" variety. The Supreme Court of the United States rejected a similar attempt to narrowly construe the back pay powers of a Federal District Court acting under Title VII of the Civil Rights Act of 1964, in fashion which succinctly disposes of that contention herein:

> If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the "make-whole" purpose right out of Title VII, for *a worker's injury is no less real simply because his employer did not inflict it in "bad faith."* (Emphasis added). *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975).

regardless of the eventual result of its appeal. If it were found by the court to be under a valid bargaining obligation it would then simply be ordered to bargain with the union; an obligation which it had avoided during the pendency of the Board and court proceedings. In the end, it would likely face a union weakened by attrition and delay. If, on the other hand, its position is sustained by the courts, the employer would be relieved both of the duty to bargain and of any make-whole liability. Such a system contains great incentive for a refusal to bargain. It stands in contradiction of the statutory principles set forth above.

It is argued that because an employer can gain review of the Board's certification order only by precipitating a refusal to bargain charge and complaint [*See, e.g., A. F. of L. v. NLRB*, 308 U.S. 401, 5 LRRM 670 (1941); *Nishikawa v. Mahony*, 66 CA 3d 781 (1977)], the application of the make-whole remedy in "technical" refusals to bargain has the effect of penalizing the employer which seeks such review. However, in *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), the Supreme Court of the United States rejected a similar contention regarding the application of compensatory remedies within the power of that agency by statute. In that case the Federal Maritime Commission had ordered the carrier to pay compensatory damages to a shipper which had been denied reasonable access to the carrier's vessels because of an invalid shipping arrangement with another party. The Commission had previously ruled similar shipping contracts unlawful. The Court of Appeals had found the agency's imposition of a compensatory award inequitable, largely because the respondent might have believed in good faith that its conduct was not unlawful in view of the unsettled law on the issue. The Supreme Court, however, characterized the respondent's conduct as the product of a calculated gamble that precedent contrary to its position could be successfully distinguished. There was a substantial risk that it could not. The Court upheld the order for a compensatory award, holding that "[a]t any rate, it has never been the law that a litigant is absolved from liability for that time during which his litigation is pending." *Id.* at 624-25. The Court further noted that during the pendency of the appeal the respondent had been able to postpone the end of its unlawful conduct

and the petitioner continued to suffer injury.[4]

It is our conclusion, in the light of all of the above considerations, and in view of the record herein, that the Respondent be ordered to make its employees whole for the losses of pay incurred by them as a result of Respondent's refusal to bargain with their certified bargaining representative.

We are, of course, applying the make-whole remedy only to the case now before us. Our concurring colleague, while not articulating his standard of application, agrees that the remedy is warranted on the facts of this case, but suggests that by our analysis of the make-whole provision we are rendering surplus the phrase "when the Board deems such relief appropriate." An analysis of the remainder of the pertinent language shows, however, that the make-whole provision is but one of several examples of affirmative action that the Board may order in a particular case:

> [the Board] . . . shall issue . . . an Order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees, with or without back pay, and making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the Employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part.

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[4] Among the cases cited in this connection by the Court was *NLRB v. Electric Vacuum Cleaner Co., Inc*, 315 U.S. 685, 10 LRRM 501 (1942). In that case the NLRB had ordered, *inter alia*, that the employer reinstate and provide back pay to certain employees. There was a two-year delay between the issuance of the complaint and the Board's final order, due largely to the Board's failure to enter an intermediate report. The Court nonetheless saw no ground for reducing the period for the award, concluding that "[w]e cannot penalize the employees for this happening." *Id.* at 698. In *APW Products Co., Inc.*, 137 NLRB 25, 29-30, 50 LRRM 1042, enf'd. 316 F.2d 899, 53 LRRM 2055 (2nd Cir. 1963), the NLRB relied upon a similar analysis of competing interests in overruling its prior practice of excluding from backpay awards the period from the issuance of the Trial Examiner's decision finding no Section 8(a)(3) violation to the Board's decision reaching a contrary conclusion.

The implementation of this, or any remedial power, of course, first requires a finding that an unfair labor practice has been committed. We obviously cannot, and do not here, speculate about whether in some future case an Employer will be found not to have bargained in good faith, or if so whether the employees have lost pay as a result. As indicated previously, we also do not seek to deprive an Employer of "due process" in his testing of his legal obligations, but we do suggest that the Employer's right to seek such determinations should not be financed by his employees. In this case and in *Adam Dairy*, we have discussed at length the factors which had led us to our conclusion, not to prejudge future cases, but out of a desire to deal fully with the wide variety of contentions advanced by the parties and the *amicus* in their briefs and exceptions, and because in this case of first impression, our public responsibility requires it.

While the concurrence emphasizes one precept of statutory construction, it ignores other principles of interpretation, equally vital, which buttress our construction of the make-whole provision. These rules were recently comprehensively reviewed by the Court in *Steilberg v. Lackner*, 69 C.A. 3d 780, 785 (1977):

> In construing a statute, the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law (*Cossack v. City of Los Angeles* (1974) 11 Cal. 3d 726, 732 [114 Cal. Rptr. 460, 523 P.2d 260]; *Select Base Materials v. Board of Equal.* (1959) 51 Cal. 2d 640, 645 [335 P.2d 672]). In determining the legislative intent, the court turns first to the words used in the statute (*People v. Knowles* (1950) 35 Cal.2d 175, 182 [217 P.2d 1]). The words, however, must be read in context, keeping in mind the nature and obvious purpose of the statute (*Johnstone v. Richardson* (1951) 103 Cal.App.2d 41, 46 [229 P.2d 9]), and the statutory language applied must be given such interpretation as will promote rather than defeat the objective and policy of the law (*City of L.A. v. Pac. Tel. & Tel. Co.* (1958) 164 Cal.App.2d 253, 256 [330 P.2d 888]). Statutes or statutory sections relating to the same subject

> must be construed together and harmonized if possible (*Mannheim v. Superior Court* (1970) 3 Cal.3d 678, 687 [91 Cal. Rptr. 585, 478 P.2d 17]; *County of Placer v. Aetna Cas. Etc. Co.* (1958) 50 Cal.2d 182, 188-189 [323 P.2d 735]). Finally, in ascertaining legislative intent, the courts should consider not only the words used, but should also take into account other matters, such as the object in view, the evils to be remedied, the history of the times, legislation upon the same subject, public policy and contemporaneous construction (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688 [104 Cal. Rptr. 110]; *Estate of Jacobs* (1943) 61 Cal.App.2d 152, 155 [142 P.2d 454].

We have determined in *Adam Dairy*, 4 ALRB No. 24 (1978) that the term "pay" in the statute has a broad meaning, encompassing all of the elements of the compensation due the employee. We adopt that construction here.[5] As in *Adam Dairy*, the record here discloses that the typical UFW contract contains a wide range of benefit provisions including health and medical coverage, pension benefits, social/educational services, as well as overtime, shift premiums, standby and travel pays, paid vacations and holidays. As all are species of employee compensation, we have the power to order that the Respondent's employees be made whole for their loss.

In implementing this remedy we are mindful of the basic remedial principles established under the national labor law and applicable to the ALRA as well. The Board has broad discretion to devise remedies, provided only that they effectuate the purposes of the Act. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 31 LRRM 2237 (1958). Particularly in the formulation of compensatory monetary remedies, this discretion has been accorded wide scope since the early days of the Wagner Act. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, at fn. 7, 8 LRRM 439 (1941); *NLRB v. Seven-Up Bottling Co., supra*. Because in making this

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[5] We therefore do not adopt the ALO's recommendation that the UFW be compensated for its loss of union dues during the make-whole period.

award, we are venturing close to the collective bargaining process itself, we are also cognizant of other considerations which are relevant to its formulation. The Board is vested with the obligation to give "...coordinated effect to the policies of the Act." *Seven-Up, supra*. This requires us to consider and accommodate the parallel statutory directives that we make employees whole (Labor Code Section 1160.3), that we not compel party agreement to particular contract terms (Labor Code Section 1155.2(a)), and that whatever remedial course we follow be promotive of future collective bargaining between these parties (Labor Code section 1140.2).

In *Adam Dairy, supra*, decided today, we have discussed in detail the considerations which have motivated our deliberations on the question of the calculation of this award. We will not repeat them here, though we incorporate that discussion herein by reference. The positions ascribed to the General Counsel, the Charging Party, and Respondent in that case are substantially identical to those presented in the record and briefs in this matter. Our ultimate resolution of these issues is the same. The evidence in this case concerns the same UFW contracts which were more extensively treated in the *Adam Dairy* litigation. For the calculation of the remedy herein, we have relied both upon the evidence regarding UFW contracts submitted to the ALO in this matter and our notice of the more extensive evidence regarding these same contracts in the *Adam Dairy* case.[6] The specific sources upon which we rely will be indicated, where appropriate, hereafter.

A. Calculation of the Basic Wage Rate

As noted in the *Adam Dairy* case, we have chosen to take a generalized approach to the calculation of the actual make-whole sum in order to avoid the complexities and delay attendant to a "costing-out" approach to this question using a typical UFW contract. On the basis of the evidence here, as in *Adam*, we have deter-

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[6] *See NLRB v. Seven-Up Bottling Co., supra*, holding that "...in devising a remedy the Board is not confined to the record of a particular proceeding." 344 U.S. at 349. *See also* K. Davis, *Administrative Law Text*, Sections 15.02, 15.03 (Third Ed. 1972).

mined that the predictable effect of the UFW's representation in the first year of its contracts negotiated during the initial certification year at Respondent was the establishment of a uniform basic wage rate averaging $3.13 per hour. We take notice from the *Adam* record that in the second year of these contracts the average rate was $3.26 per hour.

B. Calculation of Fringe Benefits

As previously discussed, we construe the term "pay" broadly to include all elements of the total compensation paid to the employee. We must now turn to a calculation of the fringe benefit aspect of the make-whole award.

We begin by taking notice of the fully developed character of the typical UFW contract. We rely upon the several introduced into evidence herein, our administrative notice of the evidence regarding the contracts in *Adam Dairy*, and our examination of 19 contracts on file with the Department of Industrial Relations. *See* Labor Code 1151.5. These contracts typically provide for a wide range of benefits beyond the basic wage. These include overtime and shift premium pays, standby and travel time pays, vacation and holiday pays, paid bereavement and jury leaves, and payments to health/medical, pension and social/educational funds. They are all modes of compensation; in some instances directly paid to the workers, in others, diverted to a plan administered for the workers' benefit.

We are confronted with alternative approaches to calculating the value of the fringe benefits in the make-whole award. One approach would entail a comprehensive review of the Respondent's records in order to apply to that agricultural operation the provisions of a typical UFW contract. We have rejected that method in *Adam Dairy* and reject it here as well. It would involve lengthy post-decisional proceedings and would place the Board in the position of assessing various alternative contractual provisions and their applicability to Respondent's operations. In other words it would place the Board virtually at the heart of the collective bargaining process. This is not, in our judgment, the way to foster future negotiations between these parties.

We have chosen to proceed on a more generalized basis in reliance upon a recent Bureau of Labor Statistics publication showing the relative proportions which pay for straight-time worked and various fringe benefits occupy in relation to total employee compensation. *See Adam Dairy, supra*, slip op. at 26-28.

Proceeding on the basis of this data, we weight the basic make-whole wage of $3.13 in 1976 at 78% of the total make-whole compensation received by Respondent's employees. The minimum make-whole wage per employee per hour in 1976 shall therefore be $4.01. This sum is produced in the following manner:

$$\$3.13 = .78\,X \text{ (where X equals the total compensation)}$$

$$\frac{\$3.13}{.78} = X$$

$$\$4.01 = X$$

Assuming a need to calculate make-whole for 1977, the second year, the minimum make-whole rate per employee per hour shall be $4.17, using the same calculation method.

We recognize that there may be numbers of Respondent's employees who receive compensation above the basic wage rate because of seniority, job skills, etc. Rather than speculate about the make-whole wage for these persons, their make-whole compensation shall be calculated on the following basis. To the extent that Respondent, during the make-whole period described hereafter, pays any bargaining unit employee a wage in excess of its prevailing basic wage, that same percentage shall be reflected in the make-whole award. If, for example, an employee is paid 10% more than the Respondent's basic labor rate, his or her make-whole amount shall be increased proportionately to $3.44 per hour ($3.13 plus 10% of $3.13).

C. The Total Make-Whole Award

The record in this case establishes that Respondent Perry, act-

ing either personally or through one or another of the entities he controls, was a custom farmer, a custom harvester, a grower, and perhaps a labor contractor during the year 1975. To the extent that this pattern occurs during the make-whole period, it is our present intent that the make-whole award shall not be applicable during those periods, to the extent Respondent was acting in the capacity of a labor contractor. If, for example, during a given period Respondent was simultaneously acting in relation to some employees as a labor contractor and in relation to others as an employer within the meaning of Labor Code Section 1140.4(c), then the award will have to be calculated in accord with the statutory design; the labor contractor period would be excluded, the non-contractor period included. If Respondent was acting solely as a labor contractor during a specific period, then that period should be totally excluded from the calculation.[7]

D. The Duration of the Make-Whole Period

The ALO found that the Respondent had failed and refused to bargain collectively with the UFW commencing on January 13, 1976, the date of the first demand to bargain after the effective date of the certification. The period of the make-whole award shall therefore be from January 13, 1976 until the Respondent commences to, and does bargain in good faith to contract or impasse. At the present time we foresee no need to adopt the General Counsel's proposal that the Respondent be required to continuously pay monthly make-whole amounts into an escrow fund during the actual bargaining process. The potentially harmful impact of this procedure on the collective bargaining process outweighs its

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[7] The record in this case suggests that in some situations where the Respondent is functioning as a farmer, *e.g.*, harvesting crops for its own account, the employees are paid on a piece-rate basis. We are aware that in many instances workers compensated on this basis may earn more than those compensated by the hour, when the total piece-rate compensation is converted into an hourly rate. No piece-rate data was presented in either this case or *Adam Dairy*. Our examination of UFW contracts filed with the Department of Industrial Relations indicates that these piece-rates are frequently complex. To the extent, then, that our award here fails to make these piece-rate workers whole in a substantially just fashion, any party may make an appropriate motion to the Board for supplementary proceedings limited to evidence on this issue.

benefits in our view. However, we remain open to the need in the future to modify our implementation of this remedy if circumstances warrant a sharper incentive to good faith bargaining.

CONCLUSION

We shall therefore order that the Respondent make its bargaining unit employees whole for the loss of wages suffered by them as the result of the Respondent's refusal to bargain from January 13, 1976 to such time as the Respondent commences to bargain in good faith and does bargain to contract or impasse. The loss of wages shall be, at a minimum, the net difference between the total compensation per hour paid by the Respondent during the make-whole period (including the per hour value of the Respondent's contribution to fringe benefits, if any) and, in 1976, the sum of $4.01 per hour. In 1977 it shall be the net difference between what Respondent did pay and the make-whole rate of $4.17 per hour.

ORDER

Pursuant to Labor Code Section 1160.3 the Respondent, Ernest Perry, Perry Farms, Inc., and Lathrop Farm Labor Center, Inc., its officers, agents, successors and assigns is hereby ordered to:

1. Cease and desist from:

a. Interfering with, by means of assaults, threats, or intimidation, representatives of the United Farm Workers of America, AFL-CIO (UFW), in the presence of agricultural employees or in circumstances in which it is likely that agricultural employees will learn of such conduct.

b. Damaging property of the UFW in the presence of agricultural employees or in circumstances in which it is likely the agricultural employees will learn of such conduct.

c. Refusing to bargain collectively in good faith with the UFW as the certified exclusive bargaining representative of its agricultural employees in violation of Labor Code Sections 1153(e),

(a) and 1155.2(a), and in particular by (1) refusing to meet at reasonable times and places with the UFW for the purpose of collective bargaining and (2) refusing to furnish the UFW with information requested by it and relevant to collective bargaining in good faith.

d. In any other manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code Section 1152.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Upon request, bargain collectively with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, and if understanding is reached, embody such understanding in a signed agreement.

b. Furnish to the UFW the information requested by it relevant to the preparation for, and conduct of, collective bargaining.

c. Make its agricultural employees whole, in the manner specified in the portion of the foregoing Decision entitled "The Remedy," for all losses of pay sustained by them as the result of Respondent's refusal to bargain.

d. Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due its employees under the terms of this Order.

e. Execute the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereafter.

f. Post copies of the attached Notice for 90 consecutive days at places to be determined by the Regional Director.

g. Provide a copy of the Notice to each employee hired by

the Respondent, when not engaged as a labor contractor with regard to that employee, during the 12-month period following the issuance of this Decision.

h. Mail copies of the attached notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed during the payroll period immediately preceding August 30, 1975.

i. A representative of the Respondent or a Board Agent shall read the attached notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by the Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

j. Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive bargaining representative of Respondent's agricultural employees is extended for a period of one year from the date on which Respondent commences to bargain in good faith with said union.

All allegations of the Complaint as amended at trial not found herein are hereby ordered dismissed.

DATED: April 26, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCARTHY, Concurring:

On the facts of this particular case, I agree that it is appropriate for the Board to invoke the make-whole remedy. However, I cannot subscribe to the broad rule which underlies the majority's application of the remedy. The majority has announced that it will grant make-whole relief in all instances where there has been a refusal to bargain and employees have incurred losses of pay as a result. Rather than adopt such a broad rule, the Board should proceed on a case-by-case basis in the application of make-whole. I believe this to be not only a more sound approach, but also one that is required by the applicable language of the Act.

Section 1160.3 of the Act provides in pertinent part that a party found to have committed an unfair labor practice may be required by the Board "to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part." Had the Legislature intended for the make-whole remedy to be applied in all instances of refusal to bargain where loss of pay has resulted, it would not have added the qualifying phrase, "when the Board deems such relief appropriate."

If the qualifying phrase is removed, the statutory provision reads the same as the rule adopted by the majority. Under the majority's approach to make-whole, the qualifying phrase thus becomes superfluous. Such a result is contrary to a well-established rule of statutory construction.[1]

By the terms of the statute, it is incumbent upon the Board to determine in each instance whether the facts warrant use of the make-whole remedy. To apply make-whole in every Section 1153(e) case, without regard to the basis or nature of the refusal to bargain and other relevant circumstances, might well be an abuse of our discretion.

A case-by-case approach to make-whole relief recognizes the importance of proceeding cautiously in a critical area where the Board lacks guidance in the form of precedent or empirical evidence. It recognizes that the make-whole remedy tends to establish terms of a collective bargaining agreement which, even in the absence of the refusal to bargain, might never have come into existence. It recognizes that the due-process rights of the employer who has a good faith doubt as to the validity of the certification might be adversely affected since his only means of obtaining judicial review is to incur a refusal-to-bargain charge. Finally, it recognizes that make-whole is, in effect, an equitable remedy, one that takes into account all of the circumstances of the refusal to bargain, and thereby increases the probability that fairness will prevail.

Dated: April 26, 1978

JOHN P. McCARTHY, Member

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[1] It will be presumed that every word, phrase and provision used in a statute was intended to have some meaning and perform some useful office; a construction making some words surplusage is to be avoided. *Watkins v. Real Estate Commissioner*, 182 C.A. 2d 397, 400 (1960); *Moyer v. Workmen's Comp. Appeals Board*, 10 c. 3d 222, 230 (1973); *Van Nuis v. Los Angeles Soap Co.*, 36 C.A. 3d 222, (1973); *People v. Gilbert*, 1 C. 3d 475, 480 (1969).

APPENDIX C

O. P. MURPHY PRODUCE CO., INC.
5 ALRB NO. 63
DECISION AND ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD

October 26, 1979

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

O.P. Murphy Produce Co., Inc.	Case Nos. 77-CE-31-M
dba O.P. Murphy & Sons,	77-CE-37-M
Respondent	77-CE-41-M
	77-CE-42-M
and	77-CE-43-M
	77-CE-53-M
United Farm Workers	77-CE-57-M
of America, AFL-CIO,	77-CE-60-M
Charging Party	5 ALRB No. 63

DECISION AND ORDER

On November 28, 1978, Administrative Law Officer (ALO) Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed a brief in reply to Respondent's exceptions.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the ALO, and to adopt his recommended Order, to the extend consistent herewith.[1]

Bargaining Issues

The ALO concluded that Respondent violated Labor Code Section 1153 (e) and (a) by refusing to bargain in good faith with the UFW. He concluded also that Respondent had demonstrated a lack of good faith in the negotiations, and that it had committed certain *per se* violations of Section 1153 (e) and (a). Respondent takes exception to these conclusions. We affirm the ALO's conclusion that Respondent unlawfully refused to bargain with the UFW.

[1] Member McCarthy did not participate in this decision.

The UFW was certified as the collective bargaining representative of Respondent's agricultural employees on March 17, 1977.[2] On April 7, the Union sent to Respondent a request for information relevant to bargaining, a proposal on contract language,[3] and a request to begin negotiations. On April 28, the Union asked that the parties meet to begin negotiations, and again requested the information. The first meeting was eventually held on June 29, and was followed by eleven more meetings, and the last being on October 13. During that period the parties reached agreement on only two major issues, union recognition and a grower-shipper clause.

A. **Bad Faith Bargaining**

Respondent did not flatly refuse to meet with the Union. There were a number of meetings, a few areas of agreement, and some substantive discussion of the issues. But the Act requires more than merely meeting with the other side and going through the motions of negotiating. Labor Code Section 1153 (e), modeled after Section 8(a) (5) of the NLRA, requires Respondent "to bargain collectively in good faith." Good faith bargaining is defined in Labor Code Section 1155.2 as:

> the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....

Early in the NLRB's history of the NLRA, the NLRB noted:

> [I]f the obligation of the Act is to produce more

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[2] Unless otherwise noted, all dates herein refer to 1977.

[3] According to the UFW negotiator, the Union generally separates collective bargaining agreements into three parts: language, economics, and local issues. The language section includes general, non-economic contract provisions such as recognition and union security. The economics section includes such items as wages and medical plans. Local issues are those drafted to meet the special concerns and needs of a particular employer and its employees, such as the size of buckets used in picking tomatoes.

> than a series of empty discussions, bargaining must mean more than mere negotiation. It must mean negotiation with a *bona fide* intent to reach an agreement if agreement is possible. *Atlas Mills, Inc.*, 3 NLRB 10, 21 (1937).

The duty to bargain in good faith requires the parties "... to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground." *NLRB v. Montgomery Ward & Co.*, 133 F. 2d 676, 686, 12 LRRM 508 (9th Cir. 1943). Mere talk is not enough.[4] Although the Act does not require the parties to actually reach agreement, or to agree to any specific provisions, it does require a sincere effort to resolve difference, and "... presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' Intl. Union, AFL-CIO*, 361 U.S. 477, 485, 45 LRRM 2705 (1960). "Parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective-bargaining negotiations as they display in other business affairs of importance." *A.H. Belo Corporation (WFAA-TV)*, 170 NLRB 1558, 1565, 69 LRRM 1239 (1968); *modified* 411, F.2d 959 (5th Cir. 1969).

Our task, therefore, is to determine whether Respondent met its "...obligation...to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement..." Cox, *The Duty to Bargain in Good Faith, 71 Harv.* L. Rev. 1401, 1413 (1958). However, we do not find here, and it has rarely been

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[4] As was observed in *NLRB v. Herman Sausage Co.*, 275 F. 2d 229, 232, 45 LRRM 2829 (5th Cir. 1960):

> [B]ad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadow boxing to a draw," or "giving the Union a runaround while purporting to be meeting with the union for the purpose of collective bargaining." (footnotes omitted)

found in other cases, an admission of intent to obstruct agreement. Rather, we must study the whole record, to discern Respondent's intent from the totality of its conduct. *See, e.g. NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 32 LRRM 2225 (1st Cir.), *cert. denied* 346 U.S. 887 (1953); *B.F. Diamond Construction Co.*, 163 NLRB 161, 64 LRRM 1333 (1967), *enforced* 410 F.2d 462 (5th Cir.), *cert. denied* 396 U.S. 835 (1969); *General Electric Company, supra; McCulloch Corp.*, 132 NLRB 201, 48 LRRM 1344 (1961).[5]

With these principles in mind, we turn now to the facts of this case. Upon reviewing all of the evidence concerning negotiations between the Union and Respondent, we find that Respondent engaged in many dilatory tactics, causing negotiations to be slow-moving and lacking in substance. Respondent postponed meetings, changed negotiators, delayed discussion on substantive issues, and failed to present adequate contract proposals. Given Respondent's methods, it would be difficult to imagine the possibility of an agreement being reached.

Respondent consistently refused to agree to meeting dates, and postponed or cancelled meetings, thereby interfering with a regular meeting schedule. While the UFW first requested on April 7 and April 28 that the parties begin negotiations, and on May 21 proposed a first meeting for June 2, the parties did not meet until June 29.[6]

Throughout the next four months, the UFW's negotiator

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[5] The Second Circuit discussed the necessity of relying on circumstantial evidence to prove bad faith:

> The problem, therefore, in resolving a charge of bad faith bargaining, is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit a "bad faith" intention, his motive must of necessity be ascertained from circumstantial evidence. *Continental Insurance Company v. NLRB*, 495 F.2d 44, 48, 86 LRRM 2003 (2d Cir. 1974).

[6] This delay was partially due to the illness of the UFW's negotiator, but the Union was prepared to meet in early June.

repeatedly requested more meetings, including night and weekend meetings. The Union was anxious to reach an agreement by the end of October, when Respondent's three-month harvest would end, as Respondent, a harvesting, packing, and selling operation, apparently had no employees in the off-season.

Respondent replied with delaying tactics. It did not answer telephone calls from Union representatives. Its negotiators refused to set a date for the next negotiating session at the conclusion of each meeting and claimed that their heavy workloads, as attorneys for many clients, interfered with their abilities to meet.

Respondent argues that the UFW itself could not have met in earnest until August, when Respondent hired its employees and the Union was in a position to establish an employee negotiating committee. The record shows, however, that the existence of the committee was not a prerequisite to meaningful negotiation, that an interim committee was established before the season began, and that the Union always indicated to Respondent its willingness to proceed with negotiations.

Where an employer does not make itself available for negotiations at reasonable times, it may be inferred that it is attempting to delay agreement. *Insulating Fabricators, Inc., Southern Division*, 144 NLRB 1325, 54 LRRM 1246 (1963), *enf'd. mem.*, 338 F. 2d 1002, 57 LRRM 2606 (4th Cir. 1964); *Solo Cup Company*, 142 NLRB 1290, 53 LRRM 1253 (1963), *enf'd.*, 332 F. 2d 447 (4th Cir. 1964); *"M" System, Inc.*, 129 NLRB 527, 47 LRRM 1017 (1960); *Hemet Wholesale Company*, 4 ALRB No. 75 (1978). There is no specific schedule of meetings, standing alone, which would or would not discharge Respondent's statutory duty. But Respondent does have an affirmative duty to make prompt and expeditious arrangements to meet and confer, and this is not met by delaying arrangements for meetings, and by failing to advise when another meeting oculd be arranged. *Exchange Parts Company*, 139 NLRB 710, 51 LRRM 1366 (1962), *enf'd.* 339 F.2d 829, *reh. denied* 341 F.2d 584 (5th Cir. 1965); *Coronet Casuals, Inc.*, 207 NLRB 304, 84 LRRM 1441 (1973). Respondent is also obligated "... to provide a representative who could conduct negotiations with the degree of diligence expected and required

of it by statute." *Insulating Fabricators, Inc., Southern Division, Supra,* at p. 1328. The use of an attorney as negotiator cannot excuse delays caused by the attorney's busy schedule. *NLRB v. Exchange Parts Company,* 339 F.2d 829, 58 LRRM 2097 (5th Cir. 1965); *NLRB v. Milgo Industrial, Inc.*, 567 F.2d 540, 97 LRRM 2079 (2nd Cir. 1977).

Respondent claims that it met its obligation by meeting twelve times over four or five months. As the number of meetings alone cannot determine the presence or absence of good faith on Respondent's part, we must evaluate the totality of the circumstances. We therefore add to our consideration the fact that Respondent's harvest season is limited to three months, and that its employees will in all probability be working elsewhere after the season ends.

Respondent also caused delays when it changed negotiators. From May through mid-September, Respondent's chief negotiator was its attorney, Dressler. On September 21, attorney Stoll became Respondent's chief negotiator, ostensibily because he was not so busy as Dressler, and would be able to devote all his time to the sessions. However, the pace of negotiations did not increase, and Stoll claimed that he was unable to meet frequently because of his busy schedule. Rather than speeding up negotiations, the change of negotiators caused more delay while the Union informed Stoll of the progress of the talks.

Difficulties also arose from Respondent's failure to provide a bargaining representative familiar with the company's operations. Respondent's attorneys were continually delaying discussion of substantive items in order to find out about company practices from Respondent's personnel. This problem was especially apparent during discussions of the UFW's proposal for a hiring hall. Respondent's negotiators suggested a practical meeting to discuss the proposal. The company representative at the meeting, however, was another of Respondent's attorneys, who was unfamiliar with both the hiring hall proposal and the company's position.

The NLRB has found that the failure of an employer to provide a bargaining representative sufficiently familiar with its opera-

tions to engage in fruitful discussions about working conditions and wages may be an indication of bad faith bargaining. *Coronet Casuals, Inc.* 207 NLRB 304, 84 LRRM 1441 (1973); *see also O & F Machine Products Company,* 239 NLRB No. 143, 100 LRRM 1090 (1978).

Respondent further delayed the negotiations by refusing to fully discuss any contract provisions until the Union had submitted a complete proposal. The UFW unwillingly agreed to this condition.[7] Meanwhile, Respondent was slow in providing information which would aid the UFW in formulating its proposal. Although the Union first submitted a comprehensive request for information on April 7, Respondent did not submit a complete list of its employees with their dates of hire, wages, and other information until October 13, and hourly picking rates were not supplied until August 24. These delays in providing information made it difficult for the Union to develop a complete proposal.

The NLRB has held that the imposition of conditions on the discussion of substantive proposals may be another indication of bad faith. *See, e.g., Lebanon Oak Flooring Co.,* 167 NLRB 753, 66 LRRM 1172 (1967); *Butcher Boy Refrigerator Door Company,* 127 NLRB 1360, 46 LRRM 1192 (1960), *enforced* 290 F.2d 22 (7th Cir. 1961); *Wavetronics Industries, Inc.* 147 NLRB 238, 56 LRRM 1212 (1964). *Rhodes-Holland Chevrolet Co.,* 146 NLRB 1304, 56 LRRM 1058 (1964).

While requiring the Union to submit a full contract proposal, Respondent's first proposal omitted approximately half of the ar-

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[7] Respondent claims that because the Union agreed to the condition, it has waived its right now to raise the issue. But the fact that the Union accepted the condition is not dispositive, as it could not have forced the company to begin substantive talks. *See "M" System, Inc., supra. International Union of Elec. Wkrs. v. NLRB,* 273 F.2d 243 (3d Cir. 1959), cited by Respondent, does not support its waiver theory. Also, the evidence in the instant case shows that the Union negotiator's acceptance of the company's demand was accompanied by a remark that she needed the requested information to complete the Union's proposal.

ticles included in the union proposal.[8] Respondent slowly added articles to is proposal until its last proposal, submitted October 13. It was not until September 2 that Respondent addressed any local issues, and then by a half-page document addressing three areas. We find that Respondent's failure promptly to provide a complete counter-proposal, after requiring a complete proposal from the Union, and its delay in furnishing requested information to the Union, constituted additional indicia of its bad faith.[9]

While the duty to bargian does not require agreement to any specific proposal, or the making of concessions, Labor Code Section 1155.2 (a), "the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union." *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135, 32 LRRM 2225 (1st Cir.), *cert. denied* 346 U.S. 887 (emphasis in original). The submission of "predictably unacceptable" proposals may in some circumstances indicate bad faith. *See, e.g., Stuart Radiator Core Mfg. Co.*, 173 NLRB 125, 69 LRRM 1243 (1968).

On October 13, Respondent finally submitted a proposal on vacations. But applying the requirements stated in the proposal would mean that *no* current employees would be eligible for vacations. Respondent also submitted a holiday proposal which provided for extra pay on one holiday, Labor Day, which was a day no one ever worked. These articles were "predictably unaccept-

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[8] Respondent claims that many areas were covered under other articles, apparently claiming that many of the Union's proposals are either part of a very broad management rights clause, or are subsumed by the "leave of absence" clause. For example, Respondent claims that "discipline and discharge" appears in its management rights clause. That clause, however, states only that management has the right to direct and supervise employees. Similarly, it claims that leaves, vacations, illnesses, and funerals are all covered by the article on unpaid leaves. This argument is not indicative of a good faith effort to reach agreement. As to several of the items, there was no apparent relationship between the item and the article cited by Respondent.

[9] We do agree with Respondent, however, that some subjects covered by the Union's proposal were not mandatory subjects of bargaining and that Respondent cannot be required to bargain about such subjects. Since many items omitted from Respondent's proposal were mandatory subjects, however, we do not find it necessary in this case to categorize each of the disputed topics.

able," and their submission at such a late day provides further indication of Respondent's lack of desire to reach agreement.

Respondent's lack of good faith is also apparent from a document it required employees to sign on September 13, before they were allowed to return to work from a one-day work stoppage. Although there was much testimony, involving translations back and forth between English and Spanish, concerning whether Supervisor Frances Arroyo told employees that they could be fired or that they could be replaced if they engaged in a strike, we do not find it necessary to resolve this conflict. By requiring individual employees to sign an agreement that they would follow the company's regulations and would not engage in protected activity, Respondent unlawfully bypassed the Union and negotiated directly with the employees. *See, e.g., Plastics Transport, Inc.*, 193 NLRB 54, 78 LRRM 1185 (1971); *Moisi & Son Trucking, Inc.*, 197 NLRB 198, 80 LRRM 1325 (1972). The Supreme Court stated in *Medo Corp. v. NLRB*, 321 U.S. 67, 684, 14 LRRM 581 (1944):

> [I]t is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representaive by negotiating with individual employees...

Viewing all of the above conduct, along with the *per se* refusals to bargain discussed below, we conclude that Respondent unlawfully attempted to delay negotiations until the end of the harvest, in an effort to preclude the possibility of agreement on a contract.

B. **Per Se Refusals to Bargain**

While we generally probe conduct for evidence of the presence or absence of subjective "good faith," some types of conduct, even when viewed independently, constitute *per se* violations of the duty to bargain, without regard to good or bad faith. Morris, *The Developing Labor Law*, p. 322. Such conduct, in addition to constituting an independent violation, acts to support an inference of bad faith. *Ibid.*, p. 323. Thus, where an employer institutes

unilateral changes in working conditions during the course of negotiations, it violates the duty to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. American Mfg. Co. of Tex.*, 351 F.2d 74 (5th Cir. 1965); *NLRB v. Mid-West Towel & Linen Service, Inc.*, 339 F.2d 958 (7th Cir 1964); *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965). The ALO concluded that Respondent unlawfully instituted unilaterial changes by implementing new picking rates and by reducing the guaranteed hours paid to dumpers and checkers. We affirm the ALO's conclusions.

Respondent and the union initially agreed, in vague terms, that Respondent could raise the picking rate for the 1977 season over that paid in 1976. Although we find that the agreement was uncertain enough to justify Respondent reasonably believing that the union had consented to an hourly rate of $3.25, Respondent could not have inferred that it could thereafter raise the rate to $3.55, and then change to a piece-rate, and a higher rate for second-picking, without consulting the union. Respondent's witness Francis Murphy admitted that Respondent implemented these changes in the picking rate without consulting with the UFW. Unilateral implementation of a wage increase constitutes a change in a significant term of employment without regard to the union's role as representative of the employees, and has been considered "by far the most important 'unilteral act,'" *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 267, 268 (2nd Cir.), *cert. denied* 375 U.S. 834 (1963), and a *per se* violation. *NLRB v. Katz, supra; NLRB v. Burlington Rendering Company*, 386 F.2d 699 (2nd Cir. 1967).

Respondent asserts that institution of the wage increase simply followed it past practice, since in 1976 it had switched from an hourly rate to a piece-rate, and then to a higher rate for second-picking. Respondent's practice, however, is limited to one season in 1976, and the raises did not follow any mechanical, prescribed pattern. As the Court stated in *NLRB v. Katz, supra*, 369 U.S. at 746;

> [T]he raises...were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial depar-

ture from past practice...

We also affirm the ALO's conclusion that Respondent unilaterally implemented a policy of paying checkers and dumpers for only four hours if they worked four hours or less, and paying them for eight hours if they worked more than four and up to eight hours.[10]

Respondent also violated Section 1153 (e) by refusing to provide the UFW with the information it requested concerning the company's productic n and yield. Since Respondent's employees are sometimes paid on a piece-rate, and the hourly rate is used at certain times during the harvest, Respondent's yield and production figures are closely related to the income of the employees. We find that Respondent violated the Act by failing and refusing to provide information which was relevant to wages, *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947 (2nd Cir. 1951), *General Electric Company v. NLRB*, 466 F.2d 1177 (6th Cir. 1972), and which was necessary to enable the union to intelligently determine appropriate wage rates. *See The Fafnir Bearing Company*, 146 NLRB 1582, 56 LRRM 1108 (1964), *enforced* 362 F.2d 716 (2nd Cir. 1966); *J.I. Case Co. v. NLRB*, 253 F. 2d 149 (7th Cir. 1958). Respondent did not fulfill its duty by providing only the gross number of employees and acreage, or by offering to allow the union to look through its general office records.

C. **Respondent's Claim of Bad Faith Bargaining by the Union**

Respondent contends that the Union exhibited bad faith by taking access without bargaining and by submitting an employee petition regarding Labor Day, and that bad faith on the part of the union precludes finding Respondent guilty of a violation. While

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[10] Respondent argues that a stipulation entered into by the parties demonstrated that this policy was effective in 1976. We disagree. While the stipulation does reflect one day in 1976 where dumpers and checkers were paid for only four hours of work, it also demonstrates that on several occasions these employees were paid for eight hours even though they worked less than four hours. While in 1976 Respondent may not have followed a consistent practice, in 1977 it distributed a notice to employees establishing the new policy.

a refusal to bargain by a union may weigh on our decision as to whether an employer engaged in unlawful conduct, *see Superior Engraving Co. v. NLRB*, 183 F.2d 783 (7th Cir. 1950), *cert. denied* 340 U.S. 930 (1951), we find here no evidence of bad faith by the Union.

We have already considered the incidents of access by UFW representative Linda Manney in our earlier decision, *O.P. Murphy & Sons*, 4 ALRB No. 106 (1978). We held there that a certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain as the representative of the employees. While Manney did not follow all of the suggested procedures we outlined in that case, we find that her conduct did not amount to bad faith. In any event, Manney's actions were limited to a two-week period in early August, while Respondent's unlawful conduct spanned a much longer period. Considering a similar allegation, the NLRB has said:

> Although contemporaneous conduct of a union in connection with bargaining may well be a factor to be considered in determining if an employer has refused to bargain, the Act plainly does not contemplate that a refusal by a union to bargain at one time operates to absolve an employer from obeying the mandate of the Act to bargain collectively on any subsequent occasion. *Times Publishing Company*, 72 NLRB 676, 683 (1947),

Respondent further claims that the Union exhibited bad faith when employees submitted a petition concerning a Labor Day holiday. According to Respondent's witness Edwin Colon, this petition was received by the company directly from the employees. As there is no evidence in the record of any UFW involvement in the circulation or submission of the petition, we find that such actions do not establish any bad faith on the part of the union.

We conclude that Respondent has violated Labor Code Section 1153 (e) and (a) by implementing new picking rates, by reducing the guaranteed hours paid to dumpers and checkers, and by

failing and refusing to provide the UFW with production and yield information.

Non-Bargaining Issues

A. **Arroyo's Statement Concerning Hiring Minors**

The ALO concluded that Respondent unlawfully threatened to discharge all employees who were minors. Respondent excepts to this conclusion, and we find merit in the exception. We agree with the ALO that the testimony of various General Counsel's witnesses on this issue was in conflict, and was intrinsically illogical. We therefore conclude that the General Counsel has not met its burden of proving that an unlawful threat occurred.

B. **The Work Stoppage**

During negotiations with Respondent, the UFW coordinated an employee negotiating committee, made up of representatives from Respondent's crews. The committee members attended the negotiation sessions, gave suggestions to the Union representatives, and reported to the employees on the progress of the bargaining. The season began in early August, and during the following month, the committee members became disillusioned with the lack of progress in the negotiations, and Respondent's unwillingness to bargain seriously.

On September 9, the employee negotiating committee met with other workers and developed a plan to "pick dirty."[11] The motive behind the plan was to put pressure on the company. The plan did not contemplate a complete work stoppage, but some employees apparently assumed that would be the eventual result of their actions.

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[11] "Dirty picking" involves not only picking ripe, well-formed tomatoes, but also rotten and misshapen fruit, and not removing stems or dirt clods. While Respondent's witness Steven Highfill testified that depending on field conditions, the rate of dirty picking is generally 25 percent, and may be as high as 40 or 50 percent; it is clear that the employee planned to cause a higher-than-average rate of dirty picking.

When the employees arrived at work on September 12, the plan was implemented. Respondent's supervisors began to check the employees' full buckets, and after rejecting several buckets, Respondent discharged Salvador Hurtado, a member of the negotiating committee.[12]

Shortly after Hurtado was discharged, a majority of the employees walked out of the field, and did not resume work that day. The employees congregated at the edge of the field, and some shouted that they desired a contract, and complained of Respondent's "bad faith." Antonio Margarito, president of the employees' negotiating commitee, addressed the workers, stating that they were stopping work because of Respondent's bad faith.

The following day, September 13, after signing the "no strike" agreement discussed *supra,* p. 11, the employees entered the field to begin work. In the presence of three of Respondent's five crews, Margarito questioned the supervisors concerning Hurtado's absence, and was told that he had been fired. Margarito then told Supervisor Arroyo that the employees would not work unless Hurtado were rehired. Arroyo answered that if the employees did not begin work within fifteen minutes, they would all be considered fired. Following Arroyo's statement, Margarito and Arnulfo Gazca drove to the location where crews four and five were to begin working, to tell those employees that the other crews had stopped work. Most of the employees then left the fields.

Respondent argues that we should reject the ALO's credibility resolutions, and instead credit its witnesses that Arroyo did not threaten the employees with discharge, but rather told them that if they did not begin work within fifteen minutes, they would have to leave the field. We have reviewed the testimony of the witnesses to Arroyo's statement, and we conclude that the ALO's credibility resolutions are supported by the record. While the version reported by two of Respondent's witnesses[13] contained no threat

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[12] The ALO found that Hurtado was lawfully discharged, and no exception was taken to this finding.

[13] The ALO apparently overlooked the testimony of Carlos Escarcega when he found that Arroyo's testimony was uncorroborated.

of discharge, the ALO credited the testimony of four employee witnesses that Arroyo threatened the employees with discharge. The testimony by these four witnesses is consistent, and the record as a whole supports the ALO's findings.

Respondent points to a statement made by company negotiator Dressler on September 14, that the employees had not been fired. Although we agree that this statement and Respondent's subsequent conduct in offering reinstatement to some of the employees could be consistent with a belief that the employees were economic strikers and were not discharged, this conduct occurred after Arroyo's threat, and cannot relieve Respondents of liability for her statement and the effect it had on the employees. Once Arroyo told the employees that they would all be considered discharged, they could reasonably conclude that if they failed to begin work within fifteen minutes they would be terminated.

We also affirm the ALO's conclusion that on September 12, when the employees stopped working, they engaged in an unfair labor practice strike, rather than an economic strike.[14] An unfair labor practice strike is activity which is "initiated in whole or in part response to" the employer's unfair labor practices, while an economic strike is one "neither caused by nor prolonged by" unfair labor practices. Morris, *The Developing Labor Law*, p. 525. While the strike may have been triggered by the dischrge of Hurtado, we find that it was a result of the employees' disillusionment and frustration with Respondent's failure to bargain in good faith, and was therefore an unfair labor practice strike. *NLRB v. Comfort, Inc.*, 365 F.2d 867 (8th Cir. 1966). An employer's il-

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[14] Respondent claims that the "dirty-picking" plan constituted activity not protected by Labor Code Section 1152, and that the employees were therefore discharged for cause. Where employees are discharged for activity which is not protected, the discharges may be lawful. *Elk Lumber Company*, 91 NLRB 333, 26 LRRM 1493 (1950). But here Respondent discharged only one employee on September 12 for picking dirty, and the ALO found that discharge to be lawful. When the employees sought to return to work the following day, Respondent signified its willingness to have them return by requiring them to sign the "no-strike" argument. Respondent cannot now claim that it later fired the employees for their activities on the preceding day. *See Mineweld Company, Division of Rasco, Inc.*, 127 NLRB 1616, 1628 (1960), and cases cited therein.

legal conduct need only be a "contributing cause" of a strike, to make it an unfair-labor-practice strike. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 236 F.2d 898 (6th Cir. 1956), *rev'd on other grounds*, 356 U.S. 342 (1958).

Respondent argues that the true purpose of the work stoppage was to obtain a contract with higher wages, and that the committee members simply knew the importance of using the legal term "bad faith." We find Respondent's efforts to distinguish the desire to reach a contract from a protest of its illegal conduct a meaningless exercise, since these goals are inevitably interrelated. As the NLRB stated in *Albion Corp.*, 228 NLRB 1365, 1367, 95 LRRM 1316 (1977), *enforced in pertinent part* 593 F.2d 936 (10th Cir. 1979).

> ...even if the sole reason for the employees' voting to strike was that there would be no new contract, still Respondent's unlawful conduct was at least in part a cause of the strike for it was that conduct that precluded a new agreement's being reached...What is important is what in fact caused the strike in whole or in part, and not...the "employees' conscious reasons for going on strike," though these reasons may correspond with the incidents or conduct that in actuality caused a particular walkout.

See also, NLRB v. Birmingham Publishing Company, 262 F.2d 2 (5th Cir. 1958). We conclude, therefore, that when the employees stopped work on September 13 they were engaged in an unfair labor practice strike.

On September 13, the employees decided to continue their strike once they had determined that Respondent would not permit Hurtado to return to work. When they refused to work, Supervisor Arroyo told the employees that they were all to be fired. The right to strike is clearly protected by Labor Code Section 1152, and by discharging the employees for striking, Respondent violated Labor Code Section 1153 (c) and (a). *Cagle's Inc.*, 234 NLRB No. 170, 98 LRRM 1117 (1978), *enforced in pertinent part*, 588 F.2d 943

(5th Cir. 1979); *see also, NLRB v. International Van Lines*, 409 U.S. 48 (1972).

C. **Reinstatement & Backpay**

Because the employees were unlawfully discharged, they have a right to backpay from the time of their discharges until October 15, when Respondent offered them reinstatement. *Abilities and Goodwill, Inc.*, 241 NLRB No. 5, 100 LRRM 1470. In this recent case, the NLRB overruled earlier precedent to the contrary and held that unlawfully discharged strikers are not required to request reinstatement in order to activate the employer's backpay obligation.

Respondent asserts that we should apply the NLRB rule established in *Southwestern Pipe, Inc.*, 179 NLRB 364 (1969), *modified* 444 F.2d 340 (5th Cir. 1971), to limit its backpay liability as to the forty positions it offered Septemer 15. We find the rule announced by the NLRB in that case to be inapplicable to the facts of this case. In *Southwestern Pipe*, the NLRB held that where an employer offers reinstatement to only a portion of the unfair labor practice strikers, those strikers may refuse the offer of reinstatment without losing status as strikers, but the employer's backpay liability is tolled as to those employees who have been offered work. The *Southwestern Pipe* rule applies to employees who are engaged in a strike; and not to discharged employees. The NLRB recently emphasized that unlawfully discharged strikers are to be treated the same as other victims of unlawful discrimination. *See Abilities and Goodwill, Inc., supra.* Indeed, the rationale adopted by the NLRB in *Southwestern Pipe* makes no sense when applied to a case where the strikers have been discharged. *Southwestern Pipe* was concerned with the problem of an employer who in good faith believed that its employees were engaged in an economic strike, and offered to reinstate them as openings occurred. In this case, however, Respondent discharged its striking employees. Therefore, the record does not reflect a situation where the employer in good faith believed that its employees were simply economic strikers. *See NLRB v. My Store, Inc.*, 468

F.2d 1146 (7th Cir. 1972), *cert. denied*, 410 U.S. 910 (1973).[15]

We conclude that Respondent's backpay liability to the discharged strikers extends from September 13 until October 15.[16]

Respondent claims that the employees should be denied backpay because of violence and threats which took place in September and October. The conduct referred to by Respondent falls into three categories: activities in the fields, threats, and damage to vehicles.

While strikers engaged in some misconduct in the fields on September 12 and on subsequent occasions, we find that the incidents were not so flagrant as to justify depriving these employees of their backpay rights. *See Republic Steel Corporation v. NLRB*, 107 F.2d 472 (3d Cir. 1939), *cert. denied* 309 U.S. 684 (1940). On September 12, some tomatoes were thrown at persons who continued working, and one employee, Clementina Chavez, was discharged for hitting a fellow worker with a tomato.[17] No other specific employees were identified. On one occasion, on September 17, some of the discharged employees ran across a broccoli field

[15] Although Respondent's attorney, on September 14, denied that the employees had been discharged, and stated that they could return to their jobs, on the following day Respondent offered only 40 jobs to the approximately 150 employees. In addition, on September 14, Charlie's Farms, a partner with Respondent's parent company, contracted with a labor contractor to provide crews to perform the harvest work the discharged employees usually did. Respondent still purchased the harvested tomatoes, and Francis Murphy testified that Respondent suffered no monetary harm by not performing the harvest work. It is clear from the record that Respondent could have chosen to rehire all of its employees to perform the work.

[16] We reject the ALO's conclusion that Respondent violated the Act by soliciting strikers to return to work. While the reinstatement offers were insufficient to toll Respondent's backpay liability, the record does not support a finding that they constituted an independent unfair labor practice.

[17] We affirm the ALO's conclusion that Chavez' discharge was lawful, and we note that no exceptions were filed thereto. She, therefore, is not entitled to backpay or reinstatement.

adjacent to where Respondent's employees were working. Broccoli plants were trampled, and some of the workers ran to their cars.[18]

We do not condone violent acts or conduct during a strike, and we will make all efforts to prevent violence, but we are also aware that "[t]he transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight," *Republic Steel Corporation v. NLRB, supra,* at 479, and that the denial of backpay as a remedy for an employer's unfair labor practices constitutes a severe punishment to employees. *Drivers Union v. Meadowmoor Co.*, 312 U.S. 287 (1949); *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977). We must therefore weigh the gravity of the employees' misconduct against the employer's unlawful acts which provoked the employees' resort to misconduct, before depriving the employees of backpay. *Ramona's Mexican Food Products*, 203 NLRB 663, 685, 83 LRRM 1705 (1973), *enf'd* 531 F.2d 390 (9th Cir. 1975); *Local 833, UAW v. NLRB*, 300 F.2d 699 (D.C. Cir.) *cert. denied 370 U.S. 911 (1962); Golay & Co. v. NLRB*, 371 F.2d 259 (7th Cir. 1966), *cert. denied* 387 U.S. 944 (1967). A factor which we consider significant here is that much of the conduct complained of is not attributed to any named individuals, and denial of backpay for all employees would punish many for the acts of a few. *See, e.g., Moore Business Form*, 224 NLRB 393, 93 LRRM 1437 (1976), *amended,* 226 NLRB 688, *enf'd in pertinent part* 574 F.2d 835, 98 LRRM 2773 (5th Cir. 1978); *NLRB v. Cambria Clay Products Co.*, 215 F.2d 48 (6th Cir. 1954). We conclude that the misconduct in the fields was not so aggravated or coercive as to justify denying backpay to the employees.

Several employees testified that they were threatened by striking employees that if they continued to work they or their vehicles would be harmed. Specific testimony identified Salvador Hur-

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[18] Respondent's witness Mike Murphy also testified that on September 12 and 21, strikers entered a field and damaged tomato plants. Neither of these incidents was corroborated, and although Respondent's witness Andy Murphy was in the fields daily to document Union violations with his camera, there was no photographic evidence of these incidents. Andy Murphy testified that on September 12 there was nothing to photograph.

tado, Fidel Alcantar and Guadalupe Alcantar as making such threats.[19] Because Hurtado was lawfully discharged, he is not eligible to receive backpay in any event. We will not order backpay for Mr. or Mrs. Alcantar, as we find that their statements constituted threats of violence and tended to restrain and coerce employees. *NLRB v. Pepsi Cola Company of Lumberton, Inc.*, 496 F.2d 226, 86 LRRM 2251 (4th Cir. 1974).

Although some vehicles owned by employees were damaged during the strike, there is insufficient evidence to link any strikers to these acts. *NLRB v. Cambria Clay Products Co., supra.* We will not deny any of the employees their right to backpay in the absence of such proof.

In sum, we shall order Respondent to pay backpay to all employees discriminatorily discharged on September 12, with the exception of Fidel and Guadalupe Alcantar.

D. **Make-Whole Remedy**

We have concluded that Respondent violated Labor Code Section 1153 (e) and (a) by failing and refusing to bargain in good faith, and we find, based on the record in this case, that by its illegal conduct Respondent was responsible for the parties' failure to reach an agreement. Accordingly, we shall order Respondent to meet and bargain collectively in good faith with the UFW and to make its employees whole for the loss of wages and other economic losses they incurred as a result of Respondent's refusal to bargain, plus interest. In fixing a date for the beginning of illegal bargaining in a surface-bargaining case, we recognize that preliminary arrangements prior to actual negotiations are an inherent part of the bargaining process. We also recognize that the

tify with exactitude the first appearance of bad faith, even when such bad faith underlies the entire course of bargaining. We will, however, base the make-whole remedy upon evidence in the record

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[19] Witnesses also identified Beatrice Savala and Luz Sanchez as speaking to them, but these conversations constituted no more than attempts to persuade the listeners to join the strike.

which we believe first establishes bad faith. We find in this case that Respondent first demonstrated its intention not to bargain in good faith on June 29, the date of the first negotiation session, by such conduct as refusing to provide information to the UFW and conditioning bargaining upon receipt of a complete proposal from the Union. The make-whole remedy shall continue until such time as Respondent commences to bargain in good faith with the UFW and thereafter bargains to a contract or a bona fide impasse.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent O.P. Murphy & Sons, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

   (a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of Respondent's agricultural employees; and in particular by unilaterally changing employees' wages or working conditions, or by failing and refusing to furnish information relevant to collective bargaining at the UFW's request.

   (b) Discouraging membership of employees in the UFW or any other labor organization by discharging any of its agricultural employees for participating in concerted activities.

   (c) In any other manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed them by Labor Code Section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

   (a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collec-

tive bargaining representative of its agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole those employees employed by Respondent in the appropriate bargaining unit at any time between June 29, 1977, to the date Respondent commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain, as such losses have been defined in *Adam Dairy, dba, Rancho Dos Rios*, 4 ALRB No. 24 (1978).

(c) Make whole each of the agricultural employees discriminatorily discharged on September 12, 1977, with the exception of Fidel Alcantar and Guadalupe Alcantar, for any losses he or she suffered as a result of his or her discharge, by payment to each of them a sum of money equal to the wages they lost plus the expenses they incurred as a result of Respondent's unlawful discharge of them until October 15, 1977, less their respective net interim earnings, together with interest thereon at the rate of seven percent per annum. Backpay shall be computed in accordance with the formula established by the Board in *Sunnyside Nurseries, Inc.*, 3 ALRB No. 42 (1977).

(d) Preserve, and upon request, make available to the Board or its agents for examination and copying, all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms of this Order.

(e) Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(f) Post copies of the attached Notice in conspicuous places on its property for a 90-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(g) Provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this Order.

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order to all agricultural employees referred to in paragraph 2(c) above.

(i) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(j) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with the Order.

It is further ordered that the certification of the UFW, as the

exclusive collective bargaining representative for Respondent's agricultural employees, be extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: October 26, 1979

/s/
Gerald A. Brown, Chairman

/s/
Herbert A. Perry, Member

Member Ruiz, Concurring:

I concur with the majority in the finding of a Section 1153 (e) violation and with the application of the make-whole remedy. I would, however, extend the application of the remedy to the date the Respondent received the union's April 7, 1977, letter requesting the company to bargain.

The majority finds, and I agree, that the totality of the circumstances reveals that Respondent engaged in surface bargaining over the entire period of negotiations. Respondent engaged in dilatory tactics, consistently refusing to agree to meeting dates and postponing or cancelling meetings. The record, however, reveals that Respondent embarked upon this course of delay well before the first negotiations session. The union sent Respondent letters on April 7, 1977, April 28, 1977, and May 21, 1977, requesting certain information and requesting that they meet and bargain. On May 27, 1977, the union made a similar request by phone which also proved fruitless. It was not until June 1, 1977, that the union received a response from Respondent sending what amounted to incomplete information and inquiring as to acceptable meeting dates. Despite the union negotiator's illness sometime between June 3, 1977, and June 29, 1977, the date of the first negotiations meeting, it is apparent that the union was ready and willing to negotiate with Respondent from the time they first formally requested bargaining in the letter of April 7, 1977. Respondent's behavior from the time of the union's first bargaining request was simply part and parcel of Respondent's dilatory conduct which continued throughout the negotiations.

In arriving at its June 29, 1977, date, the majority first makes a determination that the Employer was in fact engaging in surface bargaining by examining the totality of circumstances. It next, apparently out of a reference for the preliminary arrangements that are inherent in the negotiation process, begins the application of the make-whole remedy at a time when it determines that the Respondent's bad faith first became apparent. It seems to be saying that this is where the surface bargaining began. While I, too, recognize the need for preliminary arrangements in the bargaining process, I nevertheless believe that the reliance on the

first appearance of bad-faith bargaining to begin the remedy is misplaced. This is especially so when one considers the nature of the violation: surface bargaining. I submit that a skilled negotiator could conceal his bad-faith bargaining for a considerable period of time in surface bargaining cases. The first appearance of bad-faith bargaining is, in my opinion, irrelevant.

In surface bargaining cases, I would begin the make-whole remedy from the time of the union's first request for negotiations unless it can be shown: (1) that the union was not in fact prepared to bargain, or (2) that any delay attributable to the employer after such a request was due to the need for legitimate preliminary arrangements. There will indeed be cases where either or both of these factors will be present. I submit that this is not such a case.

Dated: October 26, 1979

/s/
Ronald L. Ruiz, Member

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help any union;

3. To bargain as a group and to choose anyone they want to speak for them:

4. To act together with other workers to try to get a

contract or to help or protect each other; and

5. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT discharge or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL pay to the employees who were unlawfully discharged on September 12 any money they lost while they were discharged.

WE WILL meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

O.P. MURPHY & SONS

Dated: By: /s/
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

O.P. Murphy Produce Co., Inc. dba O.P. Murphy & Sons	5 ALRB No. 63 Case Nos. 77-CE-31-M 77-CE-37-M 77-CE-41-M 77-CE-42-M 77-CE-43-M 77-CE-53-M 77-CE-57-M 77-CE-60-M

ALO DECISION

The ALO concluded that Respondent violated Section 1153 (e) and (a) by the totality of its conduct in the course of negotiations with the UFW between April and October 1977. Such conduct included dilatory tactics to avoid meeting with the UFW, placing unreasonable conditions upon bargaining, proffering predictably unacceptable proposals, failing to provide an adequately informed negotiator, and changing negotiators in the course of bargaining. Respondent's unilateral changes in the employees' wages and conditions of employment and its failure to provide relevant information requested by the UFW were held to be independent violations of Section 1153 (e) and (a).

The ALO also concluded that Respondent (1) violated Section 1153 (a) by Supervisor Arroyo's threat not to hire minors in the event a contract with the UFW was reached; (2) violated Section 1153 (e), (c), and (a) on September 13 by requiring, as a condition of returning to work, that employees sign an agreement not to strike on penalty of discharge; (3) violated Section 1153 (e) and (a) by failing to provide numerous items of relevant information requested by the UFW; (4) violated Section 1153 (c) and (a) by failing to reinstate unfair-labor-practice strikers after they expressed a willingness to return to work; (5) violated Section 1153 (c) and (a) by discharging the employees who engaged in the strike; and (6) violated Section 1153 (e) and (a) by soliciting strikers to return to work without consulting their certified bargaining representative.

The ALO concluded that Respondent did not violate Section 1153 (e) by unilaterally subcontracting unit work, and did not violate Section 1153 (e) and (a) by discharging employees Salvador Hurtado and Clementina Chavez, finding that said discharges were for cause.

The ALO recommended that, in addition to making employees whole for any losses sustained as a result of the Section 1153 (e) violations, the Board order Respondent to provide back pay to its employees from September 13, the date of discharge, to October 15, the date unconditional reinstatement was offered. The ALO also recommended that O.P. Murphy be ordered to reinstate all of its employees except those discharged for cause.

BOARD DECISION

The Board affirmed the ALO's conclusion that Respondent violated Section 1153 (e) and (a) by its dilatory tactics and general course of conduct, which evidenced a lack of good faith in collective bargaining, and by certain independent violations of Section 1153 (e) and (a), including unilateral changes in wages and working conditions, and refusing to provide the Union with requested information relevant to collective bargaining. Respondent also showed its disregard for the bargaining process by requiring individual employees to sign a "no-strike" agreement.

The Board rejected Respondent's defense of bad faith on the part of the Union, and also rejected the ALO's conclusion that Supervisor Arroyo unlawfully threatened to discharge minors, as the testimony as to that issue was in conflict and intrinsically illogical.

The Board concluded that the employees engaged in an unfair-labor-practice strike on September 12, finding that the strike was caused at least in part by Respondent's refusal to bargain, and that the employees again participated in strike activities on September 13 and were discharged in violation of Section 1153 (c) and (a) for such participation.

Member Ruiz would start the make-whole remedy on the date

of the union's first request for bargaining, finding that the employer embarked upon a course of delay from that date. Absent evidence that the union was not prepared to bargain or that any delay was in fact due to the need for legitimate preliminary arrangements, Member Ruiz would always begin the make-whole period at the union's first request to bargain.

REMEDY

The Board ordered backpay for all of the unlawfully discharged employees from the time of the discharges until such time as Respondent offers them reinstatement. The Board distinguished the rule in *Sothwestern Pipe*, 179 NLRB 364, which permits employers in some circumstances to limit back pay liability by offering reinstatement to some of the unfair-labor-practice strikers.

Except as to two employees who were found to have threatened nonstrikers, the Board refused to deny back pay to the employees because of misconduct by strikers. The Board found that the misconduct was not so serious as to justify denial of back pay, and noted that in many instances misconduct could not be attributed to individual employees.

The Board ordered a make-whole remedy for Respondent's failure and refusal to bargain in good faith, finding that its conduct was responsible for the parties' failure to reach agreement.

The Board found that the beginning of the make-whole period was the date of the first negotiation session, allowing for preliminary arrangements for bargaining, and looking to evidence which first established Respondent's bad faith.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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APPENDIX D

J. R. NORTON COMPANY
6 ALRB NO. 26
DECISION AND ORDER OF THE
AGRICULTURAL LABOR RELATIONS BOARD

May 30, 1980

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

	Case No. 77-CE-166-E
J. R. Norton Company Respondent and	6 ALRB No. 26 (4 ALRB No. 39) Remand
United Farm Workers of America, AFL-CIO Charging Party	

SUPPLEMENTAL DECISION AND ORDER

In accordance with the remand of the Supreme Court in *J. R. Norton Co. v. Agricultural Labor Relations Bd.*, 26 Cal. 3d 1 (1980), we have reviewed and reconsidered our remedial Order and hereby make the following findings and conclusions with respect to our original Decision and Order.

In *Norton*, the Court held that Section 1160.3 of the ALRA does not authorize this Board, "... to impose the make-whole remedy as a matter of course in cases in which an employer has refused to bargain in order to obtain judicial review of the Board's dismissal of his challenge to an election certification." 26 Cal. 3d at 9. The Court stated, however, that the remedy is appropriate where an employer, claiming merely to challenge the validity of the election results, refuses to bargain as a dilatory tactic intended to stifle employee organization. *Ibid.*

The Court noted two competing considerations in the determination whether to grant a make-whole remedy:

> The first is the need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle self-organization by employees. The second is the important interest in fostering judicial review as a check on arbitrary ad-

> ministrative action in cases in which the employer has raised a meritorious objection to an election and the objection has been rejected by the Board. 26 Cal. 3d at 30.

By imposing a blanket rule providing for a make-whole remedy in "technical" refusal-to-bargain cases, the Board was found to have over-emphasized the equitable goal of compensating employees for economic losses incurred as a result of employer misconduct, to the neglect of other policies and goals of the Act. Thus, the first lesson from *Norton* is that, in technical refusal-to-bargain cases, we must proceed on a case-by-case basis.

In *Norton*, the Court advised us to determine in each case whether the employer litigated in a reasonable good-faith belief that the election was conducted in a manner which did not fully protect employees' rights, or that misconduct occurred which affected the outcome of the election. The Court stated at page 39:

> the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. We emphasize that this holding does not imply that whenever the Board finds an employer has failed to present a prima facie case, and the finding is subsequently upheld by the courts, the Board may order make-whole relief. Such decision by hindsight would impermissibly deter judicial review of close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice. As discussed above, judicial review in this context is fundamental in providing for checks on administrative agencies as a protection against arbitrary exercises of their discretion. On the other

> hand, our holding does not mean that the Board is deprived of its make-whole power by ever colorable claim of a violation of the laboratory conditions of a representation election: it must appear that the employer reasonably and in good faith believed the violation would have affected the outcome of the election.

We take this language to mean that the employer's litigation posture must have been *reasonable* at the time of the refusal to bargain, and that the employer must have acted in *good faith*. The good-faith aspect requires consideration both of the employer's belief as to the validity of its objection, and of the employer's motive for engaging in the litigation, i.e., whether it "went through the motions of contesting the election results as an elaborate pretense to avoid bargaining." *Ibid.*

We recognize that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of the circumstances. We shall consider evidence relevant to those determinations which is available at the time of the litigation of the refusal-to-bargain charge. This also is in accordance with the Court's concern that the determination not turn on whether the employer was successful in its claim. Application of this standard will permit this Board to give adequate consideration, on a case-by-case basis, to the concerns raised by the Court in *Norton*.

A number of the briefs we have received in this and related cases suggest that we simply apply a "frivolous versus debatable" test to the election objections. We find, however, that such a limited criterion would not comply with the Court's directive to determine the necessity of the remedy "from the totality of the employer's conduct." See quoted language, above, at pages 2-3. We also believe that such an approach would not give adequate weight to the purposes of avoiding delay and of promoting collective bargaining, which the Court noted at 26 Cal. 3d at 30. While there is discussion of a "frivolous versus debatable" standard in the Court's decision, it appears from the decision as a whole

that a more comprehensive review of the cases is required.[1]

Both the NLRB and the ALRB do use a frivolous-versus-debatable test in determining whether to award attorney fees. *NLRB v. Food Store Employees*, 417 U.S. 1, 86 LRRM 2209 (1974); *Western Conference of Teamsters (V. B. Zaninovich)*, 3 ALRB No. 57 (1977). We find, however, that the objectives in applying a make-whole remedy differ significantly from the rationale for awarding or denying attorney fees. In *Teamsters*, *supra*, we noted that the award of attorney fees as a remedy where the respondent's litigation posture is "frivolous" would serve the purpose of enabling the agency "to utilize effectively its resources, unfettered by trial calendars crowded with meritless litigation." 3 ALRB No. 57, at page 7. With respect to the make-whole remedy, on the other hand, this Board, uinlike the NLRB, is specifically granted the power to use the remedy, Section 1160.3, in order to compensate employees for the losses they incur as a result of unlawful delays in collective bargaining. 26 Cal. 3d at 36. Thus, the Court stated at page 31, "It is clear that make-whole relief is appropriate when an employer refuses to bargain for the purpose of delaying the collective bargaining process." We find that a broader standard is necessary for the application of the make-whole remedy than for attorney fees.

We turn now to the question whether application of the make-whole remedy is appropriate in the instant case. We conclude that Respondent did not have a reasonable belief that the election was conducted in a manner which did not fully protect employees' rights, or that misconduct occurred which affected the outcome of the election. We therefore reaffirm our prior order providing, inter alia, for a make-whole remedy.

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[1] Footnote 20 of the Court's decision indicates that whether the objections are debatable is simply a part of the determination of the good-faith issue. In *Int'l. Union of Electric, Radio & Machine Workers v. NLRB (Tiidee Products, Inc.)*, 426 F.2d 1243, 73 LRRM 2870 (D.C. Cir. 1970), *Cert. denied* 400 U.S. 950 (1970), the Court of Appeal, finding that the objections raised were "frivolous," remanded the case to the NLRB to consider whether a make-whole remedy would be warranted. The Court did not suggest that the use of this remedy must be limited to such cases.

After an election conducted on February 6, 1976, the Tally of Ballots showed the following results: UFW-155; No Union-41; Void-1; Challenged Ballots-15. Respondent filed 17 objections to the election, 15 of which were dismissed without hearing by the Board's Executive Secretary, whose action the Board affirmed. The remaining two objections were the subject of an investigative hearing. The hearing examiner dismissed the objections, and the Board affirmed the dismissal, and certified the UFW as the exclusive collective bargaining representative of Respondent's employees. *J. R. Norton*, 3 ALRB No. 66 (1977). Respondent subsequently refused to bargain with the UFW, and was found by the Board to have thereby violated Sections 1153(e) and (a) of the Act. *J. R. Norton Company*, 4 ALRB No. 39 (1978).

Review was summarily denied by the Court of Appeal. Respondent then petitioned for review in the Supreme Court, contending that the Board and its Executive Secretary had improperly dismissed eight of the objections without granting a hearing. The Court concluded that the objecions were properly dismissed. 26 Cal. 3d at 27.

The only issue relating to the certification which was litigated in the courts was the propriety of dismissing eight of its objections without granting a hearing. Respondent contended that on the basis of the declarations which accompanied these objections, it had established a prima facie case of misconduct.[2] In dismissing these objections, the Board found that even if the facts recited in the declarations were true, there would not be cause to set aside the election. 26 Cal. 3d at 19.

In reviewing the declarations which supported Repsondent's eight objections, we find that at the time of the refusal to bargain, Respondent had no reasonable basis for believing that the alleged misconduct affected the outcome of the election.[3] Four ob-

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[2] In note 8 of its opinion, the Supreme Court stated that Respondent did not contend that the burden of supplying declarations which state a prima facie case, 8 Cal. Admin. Code § 20365, was unreasonable. Rather, the Court found that Respondent impliedly contended the validity of this requirement.

[3] The objections and the underlying declarations are described in detail by the

jections concerned alleged union activity and disruptive conduct at the polling site, three objections involved alleged violations of the Board's access rule, and the remaining objection alleged that the Board Agent improperly changed the location of the polling places.

One of the declarations as to union activity and disruptive conduct stated that union organizers stood at the entrance to the site, stopping cars, questioning the occupants, and writing something down. Another declaration stated that two unidentified people asked a voter his name and how he planned to vote. Under two early ALRB cases, *Toste Farms, Inc.*, 1 ALRB No. 16 (1975) and *William Dal Porto & Sons, Inc.*, 1 ALRB No. 19 (1975), the facts recited in these declarations are clearly insufficient to cause the election to be set aside. Other declarations alleged that the voting took place in a public area and that two intoxicated persons attempted to vote. These declarations were devoid of any showing of disruptive conduct, or of effect on the election.

The declarations relating to access violations were limited to statements that an organizer told employees to leave work in order to attend a union meeting, but that none complied with his request, and that on one occasion organizers stayed one hour over the time permitted by the Board's regulation. 8 Cal. Admin. Code Section 20900. There is no evidence or indication of any coercion or intimidation, and thus no possibility of an effect on the outcome of the election.

The final objection, relating to a change in the location of the polling site, was also the subject of one of the objections set for hearing. The Board dismissed that objection after the hearing, and Respondent did not seek review in the courts. Therefore, Respondent conceded the invalidity of the objection which was not set for hearing.

We therefore conclude that Respondent did not have a "reasonable good-faith belief" in the invalidity of the certification as a basis for seeking review of the eight objections dismissed

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Court, 26 Cal. 3d at 19-27.

by the Executive Secretary and affirmed by the Board. Consequently the delay in bargaining warrants imposition of the make-whole remedy in this case. Accordingly, we hereby reaffirm and reinstate the original remedial Order in this case.

Dated: May 30, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

RALPH FAUST, Member

APPENDIX E

MARTORI BROS. DISTRIBUTORS
8 ALRB NO. 23
DECISION AND ORDER OF THE
AGRICULTURAL LABOR RELATIONS BOARD

March 23, 1982

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 79-CE-187-EC 80-CE-10-EC 80-CE-91-EC 8 ALRB No. 23

DECISION AND ORDER

On March 10, 1981, Administrative Law Officer (ALO) Robert LeProh issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each timely filed exceptions and a supporting brief.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended order as modified herein.

General Counsel excepts to the ALO's failure to recommend that Respondent's employees be made whole for their economic losses, despite his finding that Respondent engaged in surface bargaining after November 20, 1979. We find merit in this exception.

In *Admiral Packing Company* (Dec. 14, 1981) 7 ALRB No. 43, we found that Respondent, in concert with nine other employers, bargained in bad faith with the United Farm Workers of America, AFL-CIO (UFW) by declaring a premature impasse on February 21, 1979, and refusing to participate in further negotiations. On

November 20, 1979, Respondent, then bargaining alone, contacted the UFW regarding its desire to discuss certain changes in its wage rates and wage system. The UFW responded, stating that although it would not separately negotiate wage increases, the Union was interested in resuming negotiations for a full contract. The parties met on December 7, 1979, at which time the UFW offered either to immediately sign an agreement similar to an agreement between the UFW and Sun Harvest, Inc. or to begin full-scale negotiations from the point where the parties had discontinued negotiations on February 28, 1979.

Respondent, without explanation, selected the second alternative. On December 18, 1979, UFW submitted a proposal which contained modifications of its last proposal. By letter of December 31, 1979, Respondent rejected the UFW proposal in its entirety, without discussion of the proposed modifications, again declaring impasse, and unilaterally raised its wage rates for the harvest season. In March 1980, as the harvest was ending, Respondent decided that it would respond substantively to the Union's December 13, 1979, proposal; however a full counter-proposal was not submitted to the UFW until sometime in May 1980. The record does not indicated what bargaining, if any, took place after May 1980.

We agree with the ALO that Respondent's letter of November 20, 1979, was not a good-faith effort to resume the negotiations which Respondent had halted in February 1979. On the contrary, the totality of Respondent's conduct, including the summary rejection of the UFW's December 18, 1979, offer and its delay in submitting a counter-proposal until May 1980, indicates that from Nobvember 20, 1979, until, at least, May 1980, Respondent continued the bad-faith bargaining it began on February 21, 1979. In this context, the November 20 letter appears to have been the first step in a preconceived plan to justify a wage increase which Respondent intended to make, regardless of the UFW's position. We so find.

As no bona fide impasse existed when Respondent unilaterally increased its employees' wages, and as we find that Respondent engaged in surface bargaining with the union regarding a

collective bargaining agreement, we conclude that Respondent has violated Labor Code section 1153(e) and (a). We shall therefore order the Respondent make its employees whole for any economic losses they have suffered as a result of this violation during the period from November 20, 1979, until May 1980 and the period from May 1980 until Respondent commences good-faith bargaining which results in a contract or bona fide impasse.[1]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Martori Brothers, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, suspending, or otherwise discriminating against, any agricultural employees in regard to hire or tenure of employment of any term or condition of employment because he or she has engaged in any activity protected by section 1152 of the Act.

(b) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) or its authorized representatives by unilaterally changing the wages or any other term or condition of employment of its employees.

(c) Failing to bargain in good faith with the UFW with respect to wages, hours, and other terms and conditions of employment of its employees, or the negotiation of an agreement covering such employees, or in any other manner failing or refusing to so bargain with the UFW.

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[1] We note that the make-whole remedy ordered herein overlaps the remedial order in *Admiral Packing Co.* (Dec. 14, 1981) 7 ALRB No. 43, which also applies to Respondent. For practical purposes, the Respondent's liability in *Admiral Packing* now extends from February 21, 1979, until November 19, 1979, whereupon its liability in the instant case commences. We have bifurcated the make-whole period in the instant case to expedite compliance. *John Elmore Farms* (Mar. 10, 1982) 8 ALRB No. 20.

(d) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Make whole each employee employed since January 1977, for any loss of pay and other economic losses resulting from Respondent's discontinuance of the Calexico bus transportation for workers.

(b) Upon request, meet and bargain with the UFW as exclusive collective bargaining representative of its employees regarding a collective bargaining agreement and any unlawful unilateral changes in working conditions it has effected, and embody any understanding reached in a signed agreement.

(c) Upon request of the UFW, rescind the unilateral wage increase in the lettuce piece rate instituted during the 1979-80 lettuce harvest season and thereafter pay the piece rate in effect prior to its unilaterial increase, unless and until a wage change is negotiated in good faith with th UFW as the employees' certified bargaining representative.

(d) Make whole all of its agricultural employees for any loss of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to bargain in good faith with the UFW regarding a collective bargaining agreement and the wage increases Respondent unlawfully granted to its employees in December 1979, plus interest computed at seven percent per annum. The period of said obligation shall extend from November 20, 1979, until the date in May 1980 on which Respondent submitted to the UFW a full counter-proposal, and from that date in May 1980, until the date Respondent commences good-faith bargaining with the UFW which results in a contract or bona fide impasse.

(e) Make whole all agricultural employees employed in the Martinez crew on December 5, 1979, for any loss of pay and

other economic losses they have suffered as a result of their discharge, reimbursement to be made according to the formula stated in *J & L Farms* (Aug. 12, 1980) 6 ALRB No. 43, plus interests thereon at a rate of seven percent per annum.

(f) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(g) Sign the Notice to Agricultural Employees attached hereto, and after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(h) Mail copies of the attached notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from December 1979 until the date on which the said Notice is mailed.

(i) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its premises, the period and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(j) Arrange for a representative of Respondent or Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to com-

pensate them for time lost at this reading and during the question-and-answer period.

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 23, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

MEMBER McCARTHY, Concurring:

I am in basic agreement with the ALO's analysis and conclusions in this case, but I find it necessary to distinguish my approach to this case from that of the majority. First, it should be noted that I dissented to the majority's conclusion in *Admiral Packing* (Dec. 14, 1981) 7 ALRB No. 43, that Respondent and other employers were engaged in bad-faith bargaining as of February 21, 1979. Although I concluded in my dissent that a legitimate impasse began on that date, the impasse was at least temporarily broken in the instant case when Respondent's negotiator sent a letter to the Union on November 20, 1979, proposing a wage rate higher than that offered prior to impasse. See *Hi-Way Billboards, Inc.* (1973) 206 NLRB No. 1. I would find that no bona fide impasse occurred thereafter and that, on the state of the record in this case, Respondent was not free to unilaterally raise wages to a level higher than it had offered prior to impasse.

I wish to emphasize, however, that the failure to arrive at impasse prior to making unilateral changes does not automatically render such changes unlawful. Had Respondent been able to adequately demonstrate the existence of an extenuating circumstance such as business necessity[1] or continuation of an established past practice (maintenance of the status quo), the unilateral changes in question could have been lawfully implemented irrespective of the existence of any impasse and without having afforded the Union an opportunity to bargain. (For business necessity, see *Winn-Dixie Stores* (1979) 243 NLRB 972 and *Dilene Answering Service, Inc.* (1981) 257 NLRB No. 24; for past practice, see *NLRB v.Katz* (1962) 369 NLRB No. 736; *General Motors Acceptance Corporation* (1972) 196 NLRB 137, enforced 476 F.2d 850 (1st Cir. 1973), and *Ithaca Journal-News, Inc. 7* (1981) 259 NLRB No. 60.

It does not appear that business necessity per se was raised as a defense by Respondent. As for the defense of established past practice, it must be shown that such practice is pursuant to nor-

[1]This exception takes on added importance in the agricultural setting. Timing in cultivation and perishability of crops often create situations in which changes affecting otherwise mandatory subjects of bargaining must be made rapidly and unilaterally.

mal company policy. *Reed Seismic* v. *NLRB* (1971) 440 F.2d 598. Here, the only evidence of past-practice concerns wage rates which were dictated by union contract over a relatively short period of time. It does not appear from the record that Respondent established and maintained over a significant period of time a policy of regular wage increases based on objective factors. I agree with the ALO that this makes Respondent's past-practice defense unavailing.

I am also in agreement with the ALO's position that once talks resumed, Respondent was obliged to bargain toward an entire contract rather than simply toward agreement or impasse on the one issue of wages. However, had Respondent resumed full-scale negotiations in good faith, it could lawfully have reached impasse on the wage issue and then proceeded to implement a unilateral change consistent with its last offer during negotiations. See *Winn-Dixie Stores, Inc.* v. *NLRB, supra*, 243 NLRB 972; *Central Virginia Electric Cooperative* (1981) 259 NLRB No. 46.

As Respondent has not demonstrated an adequate defense based on business necessity or continuation of the status quo, and as it failed or refused to bargain in good faith toward an entire contract once the talks had resumed, I concur in the result of the majority's decision.

Dated: March 23, 1982

JOHN P. McCARTHY, Member

APPENDIX F

ROBERT H. HICKAM
9 ALRB NO. 6 (1983)
DECISION AND ORDER OF THE
AGRICULTURAL LABOR RELATIONS BOARD

March 1, 1983

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ROBERT H. HICKAM, Respondent and	Case No. 78-CE-8-D (4 ALRB No. 73)
UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	9 ALRB No. 6

SUPPLEMENTAL DECISION AND ORDER

On October 19, 1978, the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order in this proceeding (4 ALRB No. 73), concluding that Robert H. Hickam (Respondent) had violated Labor Code section 1153(e) and (a) by refusing to bargain with the United Farm Workers of America, AFL-CIO (UFW or Union). We ordered Respondent to make its employees whole for the economic losses they suffered as a result of its refusal to bargain.

A hearing was held before Administrative Law Judge (ALJ)[1] Leonard M. Tillem for the purpose of determining the amount of makewhole due to each of Respondent's employees. Thereafter, on November 19, 1981, the ALJ issued his Decision, attached hereto. General Counsel, Charging Party, and Respondent each timely filed exceptions to the ALJ's Decision and a supporting brief, and General Counsel and Respondent each filed a reply brief.

Pursuant to the provisions of section 1146 of the Labor Code, the Board has delegated its authority in this proceeding to a three-member panel.

[1] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. code, tit. 8, 20125, amended eff. Jan. 20, 1983.)

The Board has considered the record [2] and the ALJ's Decision in light of the exceptions, supporting briefs and reply briefs, and has decided to adopt the makewhole formulas proposed by the General Counsel, as modified by the ALJ and as modified herein.

A makewhole order is designed to remedy a respondent's unfair labor practice by placing the employees in the economic position they would likely have been in but for that unfair labor practice. In this case, because Respondent unlawfully refused to bargain with the certified bargaining representative of its agricultural employees, Respondent must pay each of its agricultural employees an amount representing the difference between what she/he actually earned and what she/he would likely have earned had Respondent engaged in good faith bargaining leading to a contract with the Union.

Precedents of the National Labor Relations Board (NLRB) and this Board concerning the calculation of backpay due a discriminatee are generally applicable to the calculation of the amount of makewhole due to each of Respondent's agricultural employees. *(Kyutoku Nursery, Inc.* (1982) 8 ALRB No. 73.) The burden of any uncertainty concerning what wage rates the parties would likely have agreed upon in negotiations had Respondent bargained in good faith falls on the Respondent, whose violation of the Agricultural Labor Relations Act (Act) makes the compliance proceeding necessary in order to remedy the violation. *(Kyutoku Nursery, Inc., Ibid.)*

In makewhole cases, where the General Counsel has established at the hearing that the proposed makewhole formula(s) and calculations are reasonable and conform to the standards set forth in our decisions, we shall adopt the General Counsel's formulas and computations. We may reject or modify his or her formulas and/or computations where a respondent proves that the General Counsel's method of calculating makewhole is arbitrary, unreasonable, or inconsistent with Board precedents, or presents some other method of determining the makewhole amount which

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[2] By stipulation of the parties, the record in *Robert H. Hickam* (1982) - ALRB No. 102 has been incorporated into the record in this case.

is more appropriate. *(Kyutoku Nursery, Inc., Ibid.)*

General Labor Hourly Wage

Pursuant to our Decision and Order in *Robert H. Hickam* (1978) 4 ALRB No. 73, the Regional Director surveyed UFW contracts that were negotiated and in effect during the makewhole period, July 23, 1977 through March 2, 1980. We affirm the ALJ's finding that the contracts used to determine the average general labor hourly wages are appropriate and reasonably reflect a contract that the UFW and Respondent would have agreed to had Respondent bargained in good faith. General Counsel agrees with the ALJ's modification of the average general labor hourly wage from its annual determination to a quarterly determination, but excepts to some of the ALJ's arithmetic calculations. We find merit in those exceptions and have calculated the average general labor hourly wage for each quarter of the makewhole period as set forth in Appendix A (attached). The average general labor hourly wage plus the cost of fringe benefits[3] is the makewhole rate for Respondent's general labor employees.[4]

Respondent proposed computing the average general labor hourly wage on a calendar year basis; where the average general labor hourly wage for 1977 is based on the last six months of 1977; 1978 and 1979 each based on twelve months; and 1980 based on the first two months of 1980. Respondent has not proven that its proposed formula for computing the average general labor hourly wage is more appropriate than the formula adopted and modified by the ALJ. In this case, computing the average general labor hourly wage on a quarterly basis is the most appropriate formula to use to make Respondent's agricultural employees whole because it is based on equal periods of time (three month periods) and more accurately reflects the wages employees would have received at different times throughout the year, and we so find.

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[3] See fringe benefits section, *infra.*

[4] See Appendix C, attached.

Hourly Wage Rates Above the General Labor Wage Rate

The average general labor hourly makewhole wage rate is equivalent to Respondent's lowest wage rate (general labor). (See *Adam Dairy dba Rancho Dos Rios* (1978) 4 ALRB No. 24.) However, some of Respondent's employees were paid more than the general labor wage rate. In order to make those higher-paid employees whole, General Counsel proposed that they receive a proportional increment above the makewhole base wage (average general labor hourly wage) applicable in the given quarter. The proportional difference between what the higher paid employees were paid and the general labor wage rate Respondent paid would then be used to calculate the makewhole amounts. For example, Larry Adams earned $3.25 per hour during the third quarter of 1977 when general laborers were paid $3.00 per hour. Adams therefore earned 8.33 percent [($3.25 − 3.00) ÷ 3.00 = .0833] more than a general laborer. Since the average general labor hourly wage under comparable UFW contracts is $3.25 per hour, [5] Adams' makewhole wage would be 8.33 percent more than the $3.25 per hour average general hourly makewhole wage or $3.52 per hour.[6] This wage rate is a reasonable approximation of the wage Larry Adams would likely have received had Respondent bargained in good faith. The cost of the applicable fringe benefits are then added to this proportionally increased hourly rate to calculate the total makewhole rate.

The ALJ found this to be an appropriate method of making the higher paid employees whole. We affirm his finding, as we find the formula is appropriate and reasonable. Respondent has made no alternate proposals concerning the makewhole rate for employees who earned more than the general labor wage rate and has failed to prove that the General Counsel's proposed formula was arbitrary and/or unreasonable. Respondent's argument that it customarily paid the higher paid employees in increments of 25 cents is not persuasive and is only speculation as to what

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[5] If this wage was Adams' makewhole wage, he would receive no makewhole except fringe benefits.

[6] 3.25 (average general labor hourly makewhole wage) plus $3.25 × 8.33 percent = 3.25 + .27 = 3.52.

Respondent would have done had it negotiated the wages of those employees in the collective bargaining process.

Piece Rate Wage

The Board in *Robert H. Hickam, supra,* 4 ALRB No. 73, found that the piece rate formula used in *Adam Dairy dba Rancho Dos Rios, supra,* 4 ALRB No. 24 may not make Respondent's piece rate workers substantially whole and directed the Regional Director to examine evidence relating to the use of a percentage increase computation for piece rate workers and to determine the amount of the makewhole award using the method which would best effectuate the purposes of the Act.

General Counsel proposed the following formula to compute the makewhole amounts due to piece rate workers: (1) each quarterly average general labor hourly wage computed from the comparable UFW contracts in evidence is compared to the general labor hourly wage actually paid by Respondent during the quarter;[7] and (2) the percentage difference between the two wage rates represents the percentage the piece rate Respondent paid must be increased to arrive at the piece rate applicable to the quarterly makewhole period.[8] The makewhole piece rate is equal to the rate Respondent paid, plus the percentage increase, plus fringe benefits. For example, in the third quarter of 1979, Petrolino Adams earned $.30 per box picking and packing fruit. The general labor hourly wage rate paid by Respondent in the third quarter of 1979 was $3.25 and the computed average general labor hourly makewhole wage rate is $3.80. Thus the percentage increase is ($3.80 − 3.25) ÷ 3.25 = .1692 or 16.92 percent. In order to make Adams whole he should receive: $.30 per box plus 16.92 percent of .30 per box, i.e., (.30 × .1692) or .05 per box + .30 per box = $.35 per box, plus the cost of fringe benefits.

The ALJ found that General Counsel's percentage increase com-

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[7] See Appendix B, attached.

[8] This formula shall be utilized for all piece rates paid by Respondent including those for employees in the Thompson grape harvest.

putation for piece-rate workers was equitable. We find that the percentage increase formula is appropriate and reasonable.

Respondent presented alternate formulas with respect to the percentage increase for piece-rate workers. Respondent suggested that the actual negotiation postures of the parties regarding the Thompson grape harvest in 1981 would reflect what might have been expected in previous years. The ALJ found this method of calculating the Thompson piece rate inappropriate because of the lack of a bargaining history between the UFW and Respondent and the lack of adequate records. We affirm the ALJ's finding as to Respondent's proposal regarding the Thompson grape piece rate.

Respondent argues that the tree pruning piece rates under the contracts in evidence show that Respondent paid an amount which was within the range of piece rates found in UFW contracts and therefore no makewhole should be granted for tree pruning work. The two collective bargaining agreements in evidence between Saucelito Ranch and the UFW are the only contracts that specify a piece rate for tree pruning. The other contracts in evidence do not specify a piece rate for tree pruning. A review of Respondent's payroll data shows that it did not pay one piece rate for all tree pruning work, but instead paid one rate for pruning "large" trees and a lower rate for "small" trees and different rates for peach, nectarine, and plum trees.[9] The Saucelito—UFW contracts specified one fixed rate for tree pruning but a separate (fixed) rate for pruning prune trees. Contrary to Respondent's contention that it paid an amount for tree pruning that was within the range of piece rates found in the UFW contracts, we find that Respondent paid many different piece rates for tree pruning, most of which were below the rate specified in the Saucelito-UFW contracts and not within the range found in the contracts. Respondent failed to introduce evidence of other comparable UFW contracts with tree pruning rates during the makewhole period which would support its contention. Therefore we find that tree prun-

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[9] In February 1978 the rate varied from $.80 per tree for nectarine trees to $1.35 per tree for plum trees. In December 1978 the rate varied from $1.30 per large tree to $1.00 per small tree.

ing piece rate workers are entitled to makewhole according to the general percentage increase formula adopted for piece rate workers. We find insufficient evidence on the record to support Respondent's claim concerning UFW contract rates for tree pruning.

Respondent also argues that no makewhole should be awarded for the other operations because comparative data is not available. Even though there is no comparative data in evidence concerning other piece rates, the formula we have adopted is a reasonable estimation of what piece rate workers would have recieved had Respondent bargained in good faith and reached a contract with the UFW. In the alternative, Respondent argues that fringe benefits should not be added to compute makewhole for piece rate workers until it is detemined how many hours the piece rate workers actually worked. There is no record evidence concerning the number of hours worked by piece rate workers. Such information, if it still exists, is more likely available to Respondent than to the UFW or General Counsel. Piece rate workers are entitled to receive fringe benefits. Respondent has not presented evidence which would justify denying fringe benefits to piece rate workers. We reject Respondent's implication that fringe benefits should be based solely on hourly wages.

We reject Resppondent's alternate formulas for piece rate workers. Respondent bears the burden of any uncertainty in the calculation of makewhole because it is Respondent who has violated the Act. Respondent has not proven that General Counsel's piece rate formula is arbitrary or unreasonable and has not presented a more appropriate formula. Accordingly, we adopt General Counsel's formula for determining the makewhole amounts due for piece rate workers.

Fringe Benefits

The ALJ found that the 22 percent figure for fringe benefits as proposed by the General Counsel was too high, and suggested that the fringe benefits percentage be recalculated to correspond with the comparative cost of fringe benefits in the representative contracts in evidence. In finding 22 percent to be too high, the ALJ considered the UFW's proposals during the 1980 negotia-

tions, added the UFW's proposals for its medical plan, pension plan and Martin Luther King Fund and divided the sum by the "total" economic proposal to arrive at the fringe benefits percentage. However, the ALJ failed to consider the economic value of fringe benefits such as vacation pay, holiday pay, overtime pay, and stand-by pay and failed to place any economic value on seniority or grievance provisions. The Board expressly rejected the ALJ's method of individually quantifying the various fringe benefits in its Decision and Order in *Adam Dairy dba Rancho Dos Rios, supra,* 4 ALRB No. 24 and also rejected the method of trying to speculate as to the exact amount of fringe benefits that would have been included in a contract between the Union and Respondent. Instead the Board adopted a formula for calculating fringe benefits based on a Bureau of Labor Statistics report for nonmanufacturing industries which in 1974 found that fringe benefits represented 22 percent of a worker's total wages. That formula assigns a value of 78 percent to the makewhole wage and 22 percent to fringe benefits. We adopted that formula in order to avoid lengthy post-decisional proceedings, to provide an effective redress for employee losses and to promote the course of good faith negotiations between the parties in the future.

In *Adam Dairy dba Rancho Dos Rios, supra.* 4 ALRB No. 24, we stated that the total hourly value of all monetary benefits which employees receive from the employer shall include any sums paid by the employer for the benefit of employees. This means that a Respondent shall be credited for its share of contributions to funds to which it directly contributes for the employees' benefit. In *Kyutoku Nursery, Inc., supra,* 8 ALRB No. 73, we added the fringe benefits paid by Respondent to each employee's net pay received. Respondent is required by state and/or federal law to make contributions to certain funds for the benefit of its employees. These funds are Workers' Compensation, Unemployment and Social Security (Federal Insurance Contributions Act (FICA)). The payments to employee benefit funds which are mandated by law have increased significantly since 1974.[10] Because of the nature of agriculture in California and the nature of the

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[10] E.g., Social Security payments in 1974 stood at 4.4 percent; in 1983 they are 6.7 percent.

unemployment and workers' compensation systems, payments into these funds vary from grower to grower and are dependent upon such variables as the kinds of crops grown, the nature of the agricultural operation (mechanized or hand labor), the total number of claims made and paid, and the type of equipment used by the workers.

Because contributions to these funds are required by law, they are not and cannot be affected by the collective bargaining process. Such contributions are not covered by a collective bargaining agreement and must be made even in the absence of a collective bargaining agreement. The rights of agricultural workers to receive the benefits of such funds is governed by law rather than by a contract.

In this case, in order to make an employee whole, the wage rates computed pursuant to the previously stated formulas (both hourly and piece rates) will be assigned a value of 78.0 percent and fringe benefits will be assigned a value of 22.0 percent, 15.7 percent for voluntary benefits and 6.3 percent for mandatory benefits.[11] The evidence shows that Respondent herein made the legally required payments to those funds. As the employees have actually received the benefit of those legally required fringe benefits, there is no need for us to provide for them as part of a makewhole award. Therefore, the gross makewhole wage shall be reduced by 6.3 percent to reflect the mandatory payments made by Respondent.[12]

In *Kyutoku Nursery, Inc., supra,* 8 ALRB No. 73, we noted that General Counsel added Respondent's actual payments into those funds to the employees' gross earnings. Although this is an appropriate method of offsetting the employer's mandatory contributions, we find that the reduction of the gross makewhole wage by 6.3 percent to reflect the mandatory payments is more appropriate.

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[11] 6.3 percent represents the mandatory payments as set forth in the 1974 Bureau of Labor Statistics Report which was adopted by the Board in *Adam Dairy dba Rancho Dos Rios, supra,* 4 ALRB No. 24. (BLS Bulletin 1963.)

[12] See Appendix C for makewhole computations for the average general labor hourly wage.

Voluntary payments made to fringe benefit funds or directly to the employee shall be deducted from the gross makewhole award to the employee for that particular year. In this case, those employees who received vacation pay and/or bonuses shall have their makewhole awards for that year reduced by the amounts they actually received in such fringe benefits. (See Appendix D.)

Respondent's Financial Situation

We affirm the ALJ's finding that Respondent's present ability or inability to pay makewhole is irrelevant to our determination of the extent of Respondent's liability and is not a valid defense in ALRB makewhole proceedings. The burden of any uncertainty concerning the wage rate the parties would likely have agreed upon in negotiations had Respondent bargained in good faith falls on Respondent. *(Kyutoku Nursery, Inc., supra,* 8 ALRB No. 73; also see *Fibreboard Products Corp.* (1969) 180 NLRB 142 [72 LRRM 1617].) We find no error in the ALJ's refusal to admit into evidence Respondent's exhibits 2 and 6(a) 6(b), 6(c) and 6(d).[13]

An agricultural employee's right to receive makewhole is based on having worked for Respondent at any time during the makewhole period. Respondent's liability has been established in a prior unfair labor practice (ULP) proceeding where we concluded that Respondent unlawfully refused to bargian in good faith with the certified bargaining representative of its agricultural employees. Respondent may not now seek to mitigate or negate its liability based on any defense it raised or could have raised during the ULP proceedings.

Respondent's present financial situation has no bearing on the amount of makewhole each of its agricultural employees is entitled to receive.[14] Respondent must bear the consequences of its unlawful refusal to bargain, regardless of its financial status.

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[13] Respondent's exhibit 2 is an income statement for Robert and Shirley Hickam and Respondent's exhibits 6(a), (b), and (d) are the 1977, 1978, 1979, and 1980 tax returns of Robert and Shirley Hickam.

[14] As we cannot impose greater financial liability merely because a respondent earns an extremely large profit, we cannot impose a lesser financial liability merely because a respondent claims to have or has financial difficulties.

Agricultural Workers Entitled to Makewhole

In *Robert H. Hickam* (1982) 8 ALRB No. 102 we held that Respondent was the agricultural employer of all agricultural employees on its payroll at all times material. Respondent, by unlawfully refusing to bargain with the UFW, assumed the risk associated with that conduct, i.e., that it would be liable to its agricultural workers for makewhole. The Board's finding that Respondent is the agricultural employer of all agricultural employees on its payroll did not deny Respondent due process, nor did it violate the constitutional prohibition against ex post facto laws, which applies only to criminal statues. *(De Veau v. Braisted* (1960) 363 U.S. 144, 80 S.Ct. 1146; *Fleming v. Nestor* (1960) 363 U.S. 603, 80 S.Ct. 1367; *Calder v. Ball* (1978) 3 Dall. 386.) The Agricultural Labor Relations Act is not a criminal statute and does not impose penalties for violations but merely remedies those violations by placing the wronged party(ies) in the position(s) it (they) would have been in but for a respondent's violation(s).

Prior to committing an unfair labor practice, Respondent could have requested the Board to clarify the certified bargaining unit, but did not.[15] Respondent may not now seek to mitigate or negate its liability based on any defense it raised or could have raised during the underlying ULP proceeding. Respondent's status as an agricultural employer was not imposed retroactively.

The composition of Respondent's bargaining unit was fully litigated in *Robert H. Hickam* (1982) 8 ALRB No. 102.[16] Respondent has been on notice since our Decision and Order in 4 ALRB

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[15] Respondent argues that the UFW could have filed a petition for a unit clarification at any time since 1975. However, as Respondent refused to bargain with the UFW and never raised the issue of the proper bargaining unit until 1980, the UFW had no basis for believing the composition of the unit was questioned by Respondent.

[16] In addition, Respondent adduced evidence at this hearing concerning workers who were employed in its commecial packing shed and thus not agricultural employees entitled to receive makewhole, but failed to present evidence contesting the status of other employees listed on the makewhole specification and thereby waived the issue.

No. 73 that it was required to make whole all of its agricultural employees because of its refusal to bargain with the UFW, the certified bargaining representative of all its agricultural employees. Therefore, we reject Respondent's contention that its custom harvester status may only be applied prospectively and that equitable principles preclude what Respondent terms to be a retroactive application of its status.

Computations Pursuant to the Board's Formulas

The formulas adopted by this Board, although based on General Counsel's specification, will yield makewhole amounts for each of Respondent's agricultural employees that are different from the amounts General Counsel computed pursuant to the original specification, because the computations were made on a yearly rather than a quarterly basis and the mandatory fringe benefit costs were not deducted. Thus, computations must be made for each agricultural employee using the formulas set forth in this Decision.

The Board has considered the alternatives and has decided that General Counsel, because of his familiarity and expertise in the area of makewhole, shall be ordered to revise his calculations, using the formulas set forth in this Decision to compute the makewhole amounts owed to each of Respondent's agricultural employees,[17] and to submit the revised calculations to an ALJ. Respondent and Charging Party shall be given a reasonable time to prepare any opposition to the General Counsel's arithmetic computations.[18] The ALJ shall thereafter reopen the record for the limited purpose of receiving in evidence the General Counsel's new makewhole calculations and any opposition thereto.[19] The ALJ shall thereafter submit the revised figures to the Board in a Supplemental Decision for review.

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[17] See Appendix E (list of Agricultural Employees).

[18] Respondent was given an adequate opportunity to litigate all other issues during the original makewhole hearing.

[19] We leave the method of reopening the record to the discretion of the Administrative Law Judge.

ORDER

This case is hereby ordered remanded to an Administrative Law Judge and General Counsel is hereby ordered to prepare, with all deliberate speed, revised calculations of the amounts of makewhole due to the agricultural employees of Respondent who are listed in Appendix E of this Decision. The aforesaid amounts shall be computed by the General Counsel in accordance with the formulas set forth in this Decision. The General Counsel shall thereafter submit the revised calculations to the other parties and an Administrative Law Judge, who shall then reopen the record for the limited purpose of receiving in evidence the new calculations from the General Counsel and any party's opposition to General Counsel's arithmetic computations, and thereafter prepare and issue a Supplemental Decision and recommended Order.

Dated: March 1, 1983

ALFRED H. SONG, Chairman

JEROME H. WALDIE, Member

JORGE CARRILLO, Member

APPENDIX G

MARIO SAIKHON, INC.
8 ALRB NO. 88
DECISION AND ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD

December 15, 1982

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

	Case Nos. 79-CE-70-EC
Mario Saikhon, Inc.,	79-CE-170-EC
Respondent	79-CE-178-EC
and	79-CE-248-EC
	79-CE-248-1-EC
United Farm Workers of America,	80-CE-39-EC
AFL-CIO,	80-CE-110-EC
Charging Party	
	8 ALRB No. 88

DECISION AND ORDER

On January 21, 1981, Administrative Law Officer (ALO) Norman I. Lustig issued the attached Decision in this proceeding. Thereafter, the General Counsel, United Farm Workers of America, AFL-CIO (UFW or Union) and Mario Saikhon, Inc. (Respondent), each timely filed exceptions and a supporting brief.

Pursuant to the provisions of Labor Code section 1146,[1] the Agricultural Labor Relations Board (Board) has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to affirm his rulings, findings, and conclusions, only to the extent consistent herewith.

Bargaining History

Although the complaint in the instant matter alleges that Respondent violated section 1153(e) and (a) of the Agricultural Labor Relations Act (Act) by unilaterally increasing its employees' wages in 1979, those increases did not occur in isolation, but rather in the context of Respondent's overall bargaining conduct. On

[1] All section references herein are to the California Labor Code unless otherwise stated.

August 18, 1977, the Board certified the UFW as the collective bargaining representative of Respondent's agricultural employees. Respondent and the UFW executed their first collect bargaining agreement on February 9, 1978. The contract expired on January 1, 1979, and the parties began negotiations for a new contract in November 1978. Respondent was bargaining as a member of a group of growers, whose bargaining conduct we described in *Admiral Packing Company, et al* (Dec. 14, 1981) 7 ALRB No. 43. On January 22, 1979, Respondent's employees began an economic strike, which was converted into an unfair labor practice strike on February 21, 1979. (*Admiral Packing*, *supra*, 7 ALRB No. 43.) In our *Admiral Packing* Decision, we found that Respondent and the other grower-members of the bargaining group violated the Act by refusing to bargain in good faith with the Union. Our finding was based on the growers' participation in a campaign to bypass and discredit the Union, the take-it-or-leave-it strategy of their representatives during negotiations on February 21, 1979, and their bad faith declaration of impasse on February 28, 1979.

The instant case involves the bargaining history between the UFW and Respondent subsequent to the bargaining history litigated in *Admiral Packing*, *supra*. There was no communication between Respondent and the UFW from the declaration of impasse on February 28, 1979, until July 10, 1979, when Respondent sent the UFW a telegram proposing a wage increase.

Bargaining Issues

An employer violates section 1153(e) and (a) when it fails or refuses to meet and bargain in good faith with its employees' collective bargaining representative, and when it institutes unilateral changes in its employees' wages or any other working condition without giving the collective bargaining representative notice or an opportunity to bargain about the changes. *(Montebello Rose Co., Inc./Mount Arbor Nurseries, Inc.* (Oct. 29, 1979) 5 ALRB No. 64; *NLRB* v. *Katz* (1962) 369 U.S. 736 [50 LRRM 2177].) An employer also violates section 1153(e) and (a) by merely going through the motions of making bargaining proposals and giving the collective bargaining representative an opportunity to respond to the proposals, when the employer initiates the preliminary steps

to bargaining without any intent of actually reaching an agreement through compromise. Such an approach is concerned with the form, rather than the substance, of real collective bargaining. (*J. R. Norton Company* (Oct. 13, 1982) 8 ALRB No. 76; *Winn-Dixie Stores, Inc. (1976) 224 NLRB 1418* [92 LRRM 1625].)

In the instant case, Respondent has utilized both of the above bargaining approaches, during an unfair labor practice strike, to thwart the bargaining process and has thereby violated section 1153(e) and (a). We take official notice that the acts and conduct of Respondent which we found unlawful in *Admiral Packing*, *supra*, 7 ALRB No. 43, also constitute evidence of Respondent's overall failure to bargain in good faith here. (*Local 833, UAW, AFL-CIO* v. *NLRB* (D.C. Cir. 1962) 300 F.2d 699 [49 LRRM 2485].)

Unilateral Wage Increases

The April 5, 1979 Wage Increase. On April 5, 1979, Respondent unilaterally raised the wages of its tractor drivers to the level last proposed by the employers' group at the February 21, 1979, negotiation meeting. The UFW did not learn of that increase until after the opening of the hearing in this matter. The issue was fully litigated at the hearing and is clearly related to the allegations in the complaint, and Respondent raised no objection to the litigation of the issue. (*D'Arrigo Brothers Company* (June 22, 1982) 8 ALRB No. 45; *NLRB* v. *International Association of Bridge, Etc.* (9th Cir. 1979) 600 F.2d 770 [101 LRRM 31139].) The ALO concluded that if Respondent's prior declaration of impasse was made in bad faith, Respondent committed a per se violation of section 1153(e) and (a) by failing to give the UFW notice and an opportunity to bargain over the wage increase. As we found, in *Admiral Packing*, *supra*, 7 ALRB No. 43, that Respondent's declaration of impasse was in bad faith, we conclude that Respondent's April 5, 1979, unilateral increase of its tractor drivers' wages violated section 1153(e) and (a).

Respondent excepts to the ALO's conclusion, arguing that it was relieved of its duty to bargain about the wage increase because of strike violence attributable to the UFW and because of the

business necessity to increase wages in order to prevent its tractor drivers from seeking employment elsewhere for higher wages.

We find no merit in Respondent's exception. The NLRB has recognized that violent or coercive union-sanctioned strike misconduct can so inhibit good faith bargaining that the employer is entitled to condition the continuance of bargaining upon the union's assurance that such misconduct will cease. (*Laura Modes Company* (1963) 144 NLRB 1592 [54 LRRM 1299]; *Union Nacional de Trabajadores* (1975) 219 NLRB 862 [90 LRRM 1023], mod. on other grounds *sub nom., NLRB* v. *Union Nacional de Trabajadores* (1st Cir. 1976) 540 F.2d 1 [92 LRRM 3425].) However, Respondent has not established the most basic elements of such a defense. (See *Admiral Packing, supra*, 7 ALRB No. 43 at p. 68; *Kohler Co.* (1960) 128 NLRB 1062, 1103 [46 LRRM 1389], mod. on other grounds *sub nom., Local 833, UAW, AFL-CIO* v. *NLRB, supra*, 300 F.2d 699.) Respondent's defense is not based on actual or anticipated violence affecting its own operations or its own employees, but rather on strike violence which occurred at the work sites of two other growers in the Imperial Valley. We do not see how such violence can excuse Respondent's duty to bargain, especially when no evidence was offered to demonstrate the effect, if any, of the violence upon Respondent. Furthermore, Respondent's only evidence concerning the violence was adduced in the testimony of one of its negotiators, who did not attribute the conduct to specific employees or to union agents.

Concerning Respondent's business necessity defense, we have adopted the same case-by-case analysis used by the NLRB to determine whether any particular exigencies or circumstances justify an employer's unilateral changes in wages or other working conditions without prior notice to, or bargaining with, the union. We have emphasized that bargaining must continue to the extent that the situation permits. (*Joe Maggio, Inc., Vessey & Company, Inc. & Colace Brothers, Inc.* (Oct. 7, 1982) 8 ALRB No. 72; see *Local 777, Democratic Union Organizing Committee* v. *NLRB* (D.C. Cir. 1978) 603 F.2d 862, 890 [101 LRRM 2628].) As in its defense of strike misconduct, Respondent offered only the conclusory statements of its managerial staff to support its business necessity defense. In *Winn-Dixie Stores, Inc.* (1979) 243 NLRB

972 [101 LRRM 1534], the employer argued that it had to implement a wage increase in order to keep its rates competitive with the rates paid by other employers. The union declined to agree to the implementation of the increase because it wanted to reach an agreement on other mandatory subjects of bargaining before agreeing to any increase in wages. The employer's arguments failed in *Winn-Dixie* because there was inadequate record evidence to support the existence of a compelling business justification. Similarly, Respondent has not presented any evidence to show that it would have lost workers to competitors had it not instituted the wage increase, nor has it explained its failure to give the Union notice of and an opportunity to bargain concerning the change.

The August 17, September 20, and October 7, 1979 Wage Increases. The General Counsel and the UFW excepted to the ALO's conclusion that Respondent did not violate section 1153(e) and (a) by granting wage increases on August 17, September 20, and October 7, because Respondent gave the UFW notice and an opportunity to bargain before implementing those wage increases, and the UFW waived its right to bargain about the increases by insisting that Respondent bargain over a full contract. We find that these exceptions have merit. During the period in question, Respondent engaged in a "pro forma" or "ritual" approach to bargaining, and gave shifting reasons for the unilateral wage increases, while allowing the Union inadequate time to bargain about the proposed increases before characterizing them as historical and therefore not subject to bargaining.

On July 10, 1979, Respondent sent the UFW a telegram proposing an increase in its base wage rate for general laborers and other job classifications. The ALO found that the telegram provided adequate prior notice to the UFW of the wage increases which Respondent granted in August and September 1979. We reject that finding and hold that Respondent's telegram did not express a willingness to bargain but instead suggested an intent to avoid bargaining with the UFW.

Respondent's July 10 telegram stated that the "provisional wage increase" would be "effective July 16, 1979," and requested that the UFW "please notify us if this is acceptable as soon as possi-

ble." Within three days, after replying by telephone on the date of the telegram, the UFW sent a telegram in response, stating:

> We are not at impasse on any matter in negotiations, unilateral changes would therefore constitute unfair labor practices. We stand ready to negotiate on any matter. Wage increases should be discussed in good faith at the bargaining table.

Respondent's negotiator replied by letter two weeks later, on July 27, 1979, stating that

> ... the increase is merely historical and is done in no way to undermine the bargaining agent. The employees receive a wage increase at this time of the year and to fail to do so would result in employees seeking employment elsewhere and would seriously hamper the Company's ability to recruit and hire labor. Therefore, this letter will serve as notification to you that *we will implement the historical pay raise* as discussed in my mailgram of July 10, 1979. [Emphasis added.]

The notice Respondent provided did not afford the UFW an opportunity to bargain concerning the proposed unilateral wage increases. The July 10 telegram indicated that the wage increase would be effective in six days. The UFW's expression of its willingness to bargain about wages and other matters was ignored by Respondent. In its July 27 reply, Respondent characterized the wage increase as "merely historical," i.e., one which did not require bargaining. That characterization, Respondent's silence concernng the UFW's expressed willingness to bargain about wages and other subjects of bargaining, and Mario Saikhon's testimony that he decided to implement the proposed wage increase regardless of the UFW's response to Respondent's July 10 telegram, clearly indicate that Respondent was merely engaging in "pro forma" bargaining, and had no intention of bargaining with the UFW about the wage increases. (*Winn-Dixie Stores, Inc.*, *supra*, 243 NLRB 972; *J. R. Norton*, *supra*, 8 ALRB No. 76.)

We find no merit in Respondent's argument that the unilateral wage increases were justified because of Respondent's past practice. Our analytical approach to an employer's past practice as a justification for unilateral changes places two burdens upon the employer. First, we require evidence that past wage increases were granted with such regularity that they can be considered automatic. If we find the increases were in fact automatic, then we determine the degree, if any, of discretion used by the employer in establishing the timing and amount of the increases. Any discretionary matters involving mandatory subjects of bargaining should be the subject of negotiations between the employer and the union. (*Joe Maggio, supra*, 8 ALRB No. 72; *Oneita Knitting Mills, Inc.* (1973) 205 NRLB 500 [83 LRRM 1670].)

Respondent has not presented sufficient evidence to establish that previous wage increases were granted with such regularity that they can be considered automatic. Respondent argues that its past practice has been to maintain wages that are competitive with other growers' wages. The record indicates that Respondent's past wage increases have been governed by agreements with employees' collective bargaining representatives in seven of the preceding ten years. In the other three years, a union did not represent Respondent's employees, and wages were determined solely by Respondent. We find that Respondent's asserted past practice defense is not supported by the record, and that since the increases granted by Respondent involved a substantial degree of discretion as to timing and amount, Respondent was obligated to notify and bargain with the UFW prior to implementing the increases. (*Kaplan's Fruit and Produce Company* (July 1, 1980) 6 ALRB No. 36.)

The ALO found that the UFW waived its right to bargain concerning the August, September, and October wage increases by failing to initiate discussion of the first of those increases at the August 8, 1979, negotiating session and by consistently demanding, in its response to Respondent's September 26 and October 5 communications, that Respondent negotiate a comprehensive agreement rather than seeking to bargain over a specific interim wage increase. We find merit in the exceptions of the General Counsel and the UFW with respect to that finding.

We do not interpret the UFW's silence at the August 8 meeting as a waiver of its bargaining rights. "We will not construe a party's silence on a bargaining issue to constitute a voluntary waiver of its right to bargain unless the evidence of intentional waiver is clear and unequivocal." (*Kaplan's Fruit and Produce*, *supra*, 6 ALRB No. 36 at p. 18, citing *Caravelle Boat Company* (1977) 277 NLRB 1355 [95 LRRM 1003].) The UFW's position, as indicated in its July 13 telegram, was that it was ready to negotiate about wages and any other matters at the bargaining table. The UFW's clearly expressed willingness to bargain about wages and other matters included in a full agreement cannot be viewed as a waiver of bargaining rights. Under Labor Code section 1155.2, each party has an obligation to "... meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder ..." Furthermore, as we found in *Admiral Packing*, *supra*, 7 ALRB No. 43, the August 8 meeting was attended by other growers, and neither party raised the issue of the proposed unilateral wage increases.[2]

The record evidence of the communications between the parties (particularly Respondent's correspondence of July 27, September 26, and October 5, 1979) shows that Respondent continually attempted to limit the subjects the parties were to discuss and, thereby, undermined the collective bargaining process. Respondent attempted to cause the UFW to bargain for a contract on a piecemeal basis, even though Respondent's business conditions did not justify or require abandonment of the normal approach to collective bargaining.

Based on the above, and the record as a whole, we conclude that Respondent's unilateral wage increases of August 17,

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[2] The August 8 meeting was requested by some of the employers who had attempted to bargain as a group with the UFW. We found, in *Admiral Packing*, that those employers merely asked the UFW whether it was willing to change its position on any issues. When the UFW answered in the negative, the employers ended the meeting. It is unlikely that Respondent and the UFW could have engaged in detailed negotiations, on wages or any other matter, with each other in those circumstances.

September 20, and October 7, 1979, violated section 1153(e) and (a). (*J. R. Norton, supra*, 8 ALRB No. 76; *Winn-Dixie Stores, Inc., supra*, 224 NLRB 1418.)

The December 15, 1979 Wage Increase. Respondent excepts to the ALO's conclusion that it violated section 1153(e) and (a) by unilaterally increasing the lettuce harvest piece rate above the level of its February 21, 1979 offer, without giving the UFW notice or an opportunity to bargain about the change.

Respondent first argues that prior notice to the UFW of that increase would have been futile since Respondent expected the UFW to continue to request bargaining over mandatory subjects other than Respondent's proposed interim wage increase. However, a unilateral wage increase greater than the increase the employer has previously offered to the union in negotiations, even when there is a bona fide impasse, is a per se violation of section 1153(e) and (a). (*Bi-Rite Foods, Inc.* (1964) 147 NLRB 59, 65 [56 LRRM 1150]; *Montebello Rose, supra*, 5 ALRB No. 64.)

Respondent's second contention is that the December 15 increase was historical. Respondent attempts to support that position by arguing that it has paid its employees the "prevailing rate" for the last ten years. as previously noted, in order to sustain this argument, Respondent must demonstrate that such increases were automatic, and that the amount and timing thereof were determined by factors other than its own discretion. (*Joe Maggio, supra*, 8 ALRB No. 72; *Kaplan's Fruit and Produce, supra*, 6 ALRB No. 36; *NLRB* v. *Katz, supra*, 369 U.S. 736.)

The ALO rejected Respondent's past practice defense, and stated.

> ... [B]ased upon the demeanor of the witnesses, the inconsistency of the accounts, and the use of naked assertions without any corroboration of substance, under circumstances in which corroboration should have been easy, the Administrative Law Officer finds that Respondent has not met the burden of demonstrating a lawful justification for

a wage increase ....

We find that the record supports the ALO's finding. In its exceptions brief, Respondent argues that Mario Saikhon testified that the alleged historical increase was based upon Resondent's policy of maintaining wages which were competitive with those of other growers. This testimony, however, is insufficient to establish that the wage increase granted on December 15, 1979, was a continuation of Respondent's past practice or was granted according to objective criteria. The record shows that most of Respondent's previous wage increases were determined, in timing and amount, in accordance with collective bargaining contracts between Respondent and its employees' collective bargaining representative.

Mario Saikhon testified that there were four factors he considered in deciding the amount of the wage increases for his 1979 lettuce harvest employees: (1) the wage increases granted pursuant to past agreements with the employees' union; (2) a survey taken by the Imperial Valley Growers Association to determine competitive wages; (3) information furnished by Respondent's foreman Carl Fiore concerning the wages he was paying harvest employees in Arizona; and (4) wage data and information which Respondent's employees furnished to their foremen, who in turn relayed the information to Mario Saikhon. Saikhon's testimony shows that Respondent exercised a substantial measure of discretion in determining the amount of the December 15, 1979, wage increase. The institution of that increase, without prior notice to or bargaining with the Union, violated section 1153(e) and (a).

Lettuce Wrap Machine Operation

Respondent excepts to the ALO's conclusion that it violated section 1153(e) and (a) by failing to give the UFW notice and an opportunity to bargain concerning the effects on employees of its institution of a new lettuce wrap machine operation in December 1979.[3]

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[3] While the complaint alleged that Respondent violated section 1153(e) and (a) by its decision to use the lettuce wrap machines, neither General Counsel nor

We find no merit in Respondent's contention that it introduced the lettuce wrap machines because of consumer demand for wrapped lettuce. The impact of technological innovation on the employees in a bargaining unit is a mandatory subject of bargaining because it affects their wages, hours, and other terms and conditions of employment. (*Metromedia Inc., KMBC-TV* v. *NLRB* (8th Cir. 1978) 586 F.2d 1182 [99 LRRM 2743]; *NLRB* v. *Columbia Tribune Publishing Company* (8th Cir. 1974) 495 F.2d 1184, 1391 [86 LRRM 2078].) Respondent had previously harvested all its lettuce by using three-person teams called "trios." Respondent's witnesses testified that employees in a trio were paid according to a piece rate and each employee averaged $17 to $18 per hour, whereas members of a lettuce wrap machine crew were paid only $4 to $5 per hour. The record also indicates that Respondent's use of the machines affected more than its employees' wages. Respondent's harvesting foreman testified that the work of a trio is more strenuous and proceeds at a faster pace than the work of the machine crew.

Respondent argues, in defense of its unilateral action, that violence occurring at the operations of other growers, the UFW's anticipated refusal to bargain about the implementation of the lettuce machines, and business necessity relieved Respondent of any duty to bargain. Respondent's first two defenses are without merit. Respondent relies on the same arguments it made concerning its earlier unilateral wage increases: the alleged violence and the UFW's anticipated rejection of an interim wage increase. Our previous rejection of these defenses is equally applicable here. We also reject Respondent's defense of business necessity. Respondent argues that the machines were used to prevent the lettuce from spoiling, but the record does not support that assertion. Mario Saikhon testified that the machines were used because Respondent was developing a new business. The record also indicates that the machines handled only 1,000 to 1,500 cartons of lettuce per day, whereas a trio harvested about 5,000 cartons of lettuce a day. If Respondent was truly concerned with the prevention of spoilage, it could have harvested much quicker by using trios rather than assigning employees to the lettuce wrap machines.

We affirm the ALO's conclusion that Respondent violated sec-

tion 1153(e) and (a) by failing to give the UFW notice of, and an opportunity to bargain concerning, the effects on its employees' working conditions caused by the implementation of a lettuce wrap machine operation.

Respondent's Refusal to Reinstate Strikers

The ALO found that Respondent received unconditional offers to return to work from 44 strikers on December 14, 1979, and from 12 strikers on January 24, 1980. He also found that Respondent had a legitimate and substantial business justification, i.e., fear of a series of "quickie" strikes by the returning strikers, for denying reinstatement to the strikers irrespective of whether they were economic strikers or unfair labor practice strikers. General Counsel and the UFW except to the finding of a legitimate and substantial business justification.

The reinstatement rights of economic strikers differ substantially from those of unfair labor practice strikers. Under well-settled principles of labor law, and applicable precedents of the National Labor Relations Act, Respondent must, upon receiving an unconditional request for reinstatement from unfair labor practice strikers, reinstate them to their former positions and oust any replacement workers, if necessary, to provide employment for the returning strikers. (*Mastro Plastics Corp.*, v. *NLRB* (1956) 350 U.S. 270 [37 LRRM 2587]; Gorman, *Basic Text on Labor Law* (1977) p. 341; *O. P. Murphy Produce Company, Inc.* (Oct. 26, 1979) 5 ALRB No. 63.)

Respondent has not established that the unfair labor practice strikers engaged in misconduct serious enough to warrant or justify denying them reinstatement to their former jobs. (*O. P. Murphy Produce*, *supra*, 5 ALRB No. 63.) In *Coronet Casuals Inc.* (1973) 207 NLRB 304, 305 [84 LRRM 1441], the NLRB held that:

> Each striker's eligibility for reinstatement must be judged solely upon the incidents in which the striker in question is alleged to have participated. Unauthorized acts of violence on the part of the individual strikers are not chargeable to other union

members in the absence of proof that identifies them as participating in such violence.

Therefore, when Respondent, on or after December 14, 1979, and on or after January 24, 1980, failed or refused to reinstate the unfair labor practice strikers who made unconditional offers to return to work, and failed to remove, if necessary, any or all of the replacement workers hired in their stead during the strike, it violated section 1153(c) and (a) of the Act. (*Mastro Plastics Corp.* v. NLRB , *supra*, 350 U.S. 270; *Vessey & Company, Inc.* (Dec. 14, 1981) 7 ALRB No. 44.) We shall order Respondent to reinstate the strikers who unconditionally offered to return to work on December 14, 1979, and January 24, 1980, and to make them whole for all lost wages and other economic losses resulting from Respondent's unfair labor practices.[4] The backpay period will run from December 14, 1979 or January 24, 1980, depending upon the date of each striker's offer, to the date on which Respondent offers them reinstatement to their prior or sustantially equivalent positions.

Respondent's Lockout

On February 5, 1980, following several attempts by the parties

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the UFW excepted to the ALO's finding that Respondent had no duty to bargain over the decision itself.

[4] At the compliance stage of this proceeding, Respondent may demonstrate that certain of the striking employees were permanently replaced prior to the conversion of the strike to an unfair labor practice strike on February 21, 1979. Such permanently replaced workers are entitled to reinstatement as of their unconditional offer to return on December 14, 1979 or January 24, 1980, unless Respondent also demonstrates that it was necessary to offer permanent employment to the replacements beyond the first harvesting season. Should Respondent make such a demonstration, the strikers who were thus permanently replaced for the subsequent season are entitled to preferential hiring to fill vacancies which occur after their unconditional offer to return to work. Additionally, if such vacancies occurred in subsequent seasons and the permanently replaced employees were refused rehire to fill those vacancies, then those employees eligible for the vacancies are entitled to backpay as of the date of the vacancy in the subsequent seasons. (*Frudden Produce, Inc.* (June 16, 1982) 8 ALRB No. 42; *Seabreeze Berry Farms* (Nov. 16, 1981) 7 ALRB No. 40.)

to negotiate the return of those strikers who had unconditionally offered to return to work, Respondent notified the UFW that it was locking out all employees who had engaged in the strike. The ALO held that an employer cannot "convert a strike into a lockout with respect to a minority of striking employees who have made an unconditional offer to return, because to allow such would be to allow the ability of a striking employee to return unconditionally to depend upon the discretion of the employer, and would sweep away a pillar of labor law." Respondent excepts to that analysis.

Respondent argues that it had a right to lock out the strikers because the strike was an economic strike, the conditions (an interim grievance procedure and a second strike vote) sought by Respondent as a quid pro quo for the strikers' return to work were reasonable, and the seasonal nature of Respondent's products would cause special business problems if Respondent reinstated the strikers.

The NLRB has held that an employer may lawfully lock out its employees "... for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." (*American Ship Building Co.* v. *NLRB* (1965) 380 U.S. 300, 318 [58 LRRM 2672].) Here, Respondent's bargaining position was not legitimate. Respondent, in bad faith, declared an impasse, and engaged in bad faith bargaining throughout the strike. The facts here, and the arguments made by the parties, are similar to those in *American Cyanamid Co.* v. *NLRB* (7th Cir. 1979) 592 F.2d 356, 363 [100 LRRM 2640]:

> ...[T]he Company insists that it "strains credulity beyond the breaking point"...to accept that the Union's unconditional back to work offer was *bona fide*. It describes the importance of the Fortier plant (which supplies numerous other Company plants with essential materials), the expense and danger to persons and property inherent in even a partial shutdown of the plant, the length and bitterness of the strike (including some serious incidents of violence), and on the basis of those factors

> characterizes the back to work offer as a Trojan Horse. The Company insists that the Union wanted to resume work only so that it could coerce the Company with the threat of another expensive and dangerous strike. Although such distrust is perhaps understandable in these unfortunately bitter circumstances, there is no support for it in the record. The Union repeatedly affirmed its good faith and its recognition that the Company was entitled to an assurance of a reasonable period without a strike. The Company points to the Union's refusal to propose such a reasonable time as evidence of its bad faith, but this only demonstrates that the distrust was mutual...
>
> We need not decide under what circumstances an employer might be able to convert an economic strike to a permissible lockout or what conditions, if any, short of reaching agreement on the economic issues it might attach to ending such a lockout. Here we are faced with an unfair labor practice strike, which entitled the employees to reinstatement upon their unconditional back to work offer.

As in *American Cyanamid*, the strike in the instant matter has been long and bitter. However, we agree with the NLRB and the court that these factors have an inconsequential impact upon the reinstatement rights of the returning unfair labor practice strikers. It is Respondent who prolonged the strike by its unfair practices and, thus, perpetuated the very circumstances and possible risks argued by Respondent to justify the lockout.

On the basis of the record evidence, we find that Respondent's lockout was not a permissible lockout.[5] Rather, we find that it was an act of discrimination and retaliation against the strikers for engaging in union activity. The NLRB upheld the ad-

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[5] In *Darling & Co.* (1968) 171 NLRB 801, 802 [68 LRRM 1133], enforced *sub nom., Lane* v. *NLRB* (D.C. Cir. 1979) 418 F.2d 1208 [72 LRRM 2439] the NLRB held that an employer's lockout is legitimate if the record does not contain

ministrative law judge's decision in *McGwier Co., Inc.* (1973) 204 NLRB 492 [83 LRRM 1570], which distinguished a privileged from an unlawful discriminatory lockout:

> In the instant case, unlike the situation in *American Ship Building Co.*, 380 U.S. 300 (1965), and as noted in *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, there is an obvious disparate treatment of employees in that the Company locked out only those employees who, by striking, had identified themselves as union adherents, while continuing to operate with those employees who had not joined the strike and then later with replacements. It cannot be said that Respondent's action was taken to enhance its bargaining position, for no bargaining position had yet even been taken by Respondent; rather, it seems that the purpose of the lockout was to undermine adherence to the Union by demonstrating to the employees, by the disparate treatment accorded union and nonunion employees, the advantages from the standpoint of job security of rejecting the Union or of refraining from concerted action in support of the Union.
>
> On the basis of the above, it is found that the lockout in the instant case was not privileged and, by deliberately limiting the impact of the lockout to those employees who had struck, Respondent discriminated against them for striking, and by such action violated Section 8 (a) (3) and (1) of the Act.

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evidence allowing an inference that the employer was guided by a motive to discourage union activity or to evade bargaining. Absent such evidence, the NLRB woud still find the lockout illegal if it inherent prejudiced union interest and was devoid of significant economic justification. The NLRB found the lockout legitimate because the parties had bargained extensively and in good faith on all subjects, the union had declared that it would strike, if it did so, at a time of its own choosing, and there had been a history of work stoppages in the employer's busy season. (See, *Carlson Roofing Co., Inc.* (1979) 245 NLRB 13, 16-18 [102 LRRM 1532]; Gorman, *Basic Text on Labor Law* (1977) pp. 358-360.)

We find that Respondent declared the lockout for discriminatory purposes. Respondent did not claim that the lockout was justified because it sought to protect its claimed legitimate bargaining position. Respondent made a general note in its exception brief of the fact that its product is subject to spoilage, with neither a presentation of the extenuating circumstances faced by Respondent[6] nor a showing of how the strikers, if reinstated, would jeopardize production.[7] Respondent also argues that the lockout would not have been imposed had the Union agreed to hold another strike vote as a condition of Respondent's reinstatement of those strikers who had unconditionally offered to return to work. The record does not support this argument. Respondent's negotiator testified that he offered the strike vote proposal, but admitted that he had not discussed it with Respondent.

We find ourselves faced with an issue similar to one resolved by the NLRB in *Abilities and Goodwill, Inc.* (1979) 241 NLRB 27 [100 LRRM 1470], enforcement denied on other grounds, 612 F.2d 6 [103 LRRM 2029]. (See *Pappas & Company* (Aug. 13, 1979) 5 ALRB No. 52.) The issue there was whether to require strikers who were unlawfully discharged to make an application for reinstatement. Here, we are faced with an unlawful lockout, which was, in effect, an unlawful discharge of the strikers.

Since unfair labor practice strikers are not entitled to backpay unless the employer refuses to reinstate them upon their unconditional offer to return to work, we must determine whether the strikers here could reasonably have believed that such an offer would be futile because of Respondent's conduct.[8] Respondent's

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[6] (See *Duluth Bottling Association* (1943) 48 NLRB 1335, 1347-135 [12 LRRM 151].)

[7] (See *International Shoe Company* (1953) 93 NLRB 907, 909, 921-923 [27 LRRM 1504].)

[8] Respondent's declaration of a lockout to the Union agents constituted constructive notice of the lockout to all the strikers, in view of the close relationship between the strikers and their Union. Respondent's declaration of a lockout to the union agents could reasonably be expected to have been communicated to all the strikers, making clear to them that a request for reinstatement would be a futile act.

rejection of the 56 strikers' offers to return to work and its subsequent unlawful lockout would surely tend to influence the other strikers in deciding whether to make application for reinstatement.[9] Given that reasonable inference, it is likely that each individual striker was deterred from seeking reinstatement by Respondent's unlawful conduct. (*J. R. Norton*, *supra*, 8 ALRB No. 76.) We therefore resolve the issue here by using the NLRB's reasoning in *Abilities and Goodwill*:

> ... [B]ecause the uncertainty is caused by the employer's unlawful conduct, we will not indulge in the presumption that the discharge itself played no part in keeping the employees out of work. Rather, it seems to us more equitable to resolve the ambiguity against the wrongdoer and presume, absent indications to the contrary, the discharged strikers would have made the necessary application were it not for the fact that the discharge itself seemingly made such an application a futility. (*Abilities and Goodwill*, *supra*, 241 NLRB at p. 28.)

Therefore, we conclude that Respondent violated section 1153(c) and (a) of the Act by locking out all strikers on or after February 5. (*Dimo Ambulette Service, Inc.* (1981) 255 NLRB 5 [106 LRRM 1343].) We find that the locked-out strikers who did not make an unconditional offer to return to work prior to the lockout are entitled to reinstatement and to reimbursement for all lost wages and other economic losses resulting from Respondent's unlawful lockout. The backpay period for these strikers will run from February 5, 1980, to the date Respondent offers them reinstatement to their prior or equivalent positions.

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[9] We note that in some circumstances the refusal to reinstate some unfair labor practice strikers who had offered to return to work may be a sufficient basis for the other strikers to believe that application for reinstatement would be futile. The negotiations between the Union and Respondent, and the strikers' January 24 offer to return, indicate to us that the strikers still believed, prior to the lockout, that reinstatement was possible.

Remedy

Based on the record as a whole, we have concluded that Respondent violated section 1153(e) and (a) by its unilateral changes and by its failures and refusals to bargain, continuing the acts and conduct which we found to be unlawful in *Admiral Packing*, *supra*, 7 ALRB No. 43. Respondent's refusal to reinstate the strikers who had made unconditional offers to return to work, and its subsequent unlawful lockout of the remaining strikers, were clearly in violation of section 1153(c) and (a).

We shall therefore order Respondent to make whole its employees for all losses of pay and other economic losses they have suffered as a result of Respondent's acts of discrimination and refusals to bargain. (*Montebello Rose*, *supra*, 5 ALRB No. 64; *O. P. Murphy Produce*, *supra*, 5 ALRB No. 63.) The record in this case presents the parties' bargaining history from February 28, 1979, the date the growers declared an impasse in the group bargaining, to July 14, 1980, the first day of the hearing in this case. We found in *Admiral Packing*, *supra*, 7 ALRB No. 43, that the employers, including Respondent herein, first refused to bargain in good faith on February 21, and we ordered makewhole awards for the affected employees to be computed from that date. Therefore, in our remedial order in this case, we shall order Respondent to make whole its employees for the economic losses they suffered from February 21, 1979, to July 14, 1980 (the date the hearing herein opened, and from July 14, 1980, until such time as Respondent commences good faith bargaining with the UFW which leads to a contract or to a bona fide impasse. (*John Elmore Farms, et al* (Mar. 10, 1982) 8 ALRB No. 20.) We note that the makewhole period covered in our Order in this case will to some extent overlap the makewhole period included in our Order in *Admiral Packing*, *supra*, 7 ALRB No. 43. Respondent's employees will, of course, be made whole only once for the losses they incurred as a result of Respondent's bad faith bargaining.[10]

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[10] Our makewhole Order in *Admiral Packing* did not include amounts by which Respondent's contributions to the UFW Robert F. Kennedy Medical Fund and Martin Luther King Farmworkers Fund would have increased if Respondent had

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Mario Saikhon, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing the wages or any other term or condition of employment of its agricultural employees, without first notifying and affording the United Farm Workers of America, AFL-CIO (UFW) a reasonable opportunity to bargain with respect thereto.

(b) Failing or refusing, through its general course of conduct, or otherwise, to bargain collectively in good faith, on request, with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

(c) Failing or refusing to bargain in good faith with the UFW concerning the effect on its employees' wages, or any other term or condition of their employment, caused by Respondent's implementation of a new harvesting operation.

(d) Failing or refusing to rehire or reinstate, or otherwise discriminating against, any agricultural employee because of his or her union activity or other protected concerted activity.

(e) Locking out, or otherwise discriminating against, any agricultural employee because of his or her union activity or other protected concerted activity.

(f) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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bargained in good faith to contract, since we found that the UFW violated section 1154(c) of the Act by failing or refusing to provide information which Resondent had requested concerning these funds.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act.

(a) Upon request, meet and bargain in good faith with the UFW as the certified exclusive collective bargaining representative of its employees and embody any understanding reached in a signed agreement.

(b) If the UFW so requests, rescind its unilateral wage increases of 1979 and thereafter bargain in good faith with the UFW over any proposed wage increases for its agricultural employees.

(c) If the UFW so requests, rescind any or all changes in its employees' wages and working conditions caused by the implementation of lettuce wrap machines and thereafter bargain in good faith with the UFW over the effects of any proposed change in operation on the wages, working hours, or any other term or condition of employment of its agricultural employees.

(d) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in *Lu-Ette Farms, Inc.* (Aug. 18, 1982) 8 ALRB No. 55, the period of said obligation to extend from February 21, 1979, until July 14, 1980, and from July 14, 1980, until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(e) Offer to the below-named strikers, who made an unconditional offer to return to work on December 14, 1979, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges, and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire or reinstate them, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with

our Decision and Order in *Lu-Ette Farms, Inc.* (Aug. 18, 1982) 8 ALRB No. 55:

Jesus Arredondo	Armando Martinez
Cesar Beyam	Enrique Martinez
Lidia Buzo	Hector Martinez
Gilberto Correa	Ignacio Martinez
Santiago Covarruvias	Jose Martinez
Ernesto G. De La Rosa	Ladislao Martinez
Ramon Duran	Pedro Martinez
Guillermo Duron	Nazario Mendez
Jose A. Franco	Juan Morales
Asencion Galabiz	Aniceto Murguia
Higinio Gallo	Marcelino Palacio
Jose Guzman	Elias Peceno
Amador Hernandez	Isabel Perez
Gilberto Hernandez	Jose Quijas
Jesus Hernandez	Jose M. Quintero
Elicio Herrera	Jesus Reyna
Mario Larios	Manuel Rivera
Atilano Leyva	Carlos Rodriguez
Enrique Lopez	Santiago Ronquillo
David Marquez	Ramon Sepulveda
Adrian Martinez	Hilario Sierra
Antonio Martinez	Cecilio Zuniga

(f) Offer to the below-named strikers, who made an unconditional offer to return to work on January 24, 1980, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges, and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire or reinstate them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in *Lu-Ette Farms, Inc.* (Aug. 18, 1982) 8 ALRB No. 55:

Ramon Burgos	Manuel Navarro
Lorenzo Contreras	Guadalupe Pacheco

Julian de Lucas Garcia #2	Juan Placencia
Emeterio Gallegos	Felipe Rios
Ruben A. Gonzalez	Vicente Saucedo
Elias Torres Jaime	Domingo Solis

(g) Offer to all the strikers Reespondent locked out on February 5, 1980, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges, and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's unlawful lockout, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in *Lu-Ette Farms, Inc.* (Aug. 18, 1982) 8 ALRB No. 55.

(h) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay and makewhole periods and the amounts of backpay, makewhole and interest due under the terms of this Order.

(i) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(j) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from April 5, 1979, until the date on which the said Notice is mailed.

(k) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has

been altered, defaced, covered, or removed.

(l) Provide a copy of the attached Notice to each agricultural employee hired during the 12-month period following the date of issuance of this Order.

(m) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on compay time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(n) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

It is further ordered that the certification of the UFW as the exclusive collective bargaining representative of the agricultural employees of Repsondent be, and it hereby is, extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: December 15, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

APPENDIX "D"

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, by the United Farm Workers of America (AFL-CIO) (UFW), the certified bargaining representative of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Mario Saikhon, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by changing employees' wages and working conditions without notifying or bargaining with the UFW; by failing to bargain in good faith with the UFW; by failing or refusing to reinstate unfair labor practice strikers who offered to return to work on December 14, 1979, and on January 24, 1980; and by locking out all unfair labor practice strikers on February 5, 1980. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;

2. To form, jon, or help unions;

3. To vote in a secret ballot election to decide whether you want a union to represent you;

4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;

5. To act together with other workers to help and protect one another; and

6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT make any changes in your wages, hours, or conditions of employment without notifying and negotiating with the UFW about such changes.

WE WILL meet with authorized representatives of the UFW, at their request, for the purpose of reaching a contract covering your wages, hours, and conditions of employment.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW, plus interest.

WE WILL NOT fail or refuse to rehire or reinstate, or otherwise discriminate against, any agricultural employee in regard to his or her employment because he or she has engaged in a lawful strike or otherwise supported the UFW or any other labor organization or engaged in any other protected concerted activity.

WE WILL offer to reinstate all employees, then on strike, who offered to return to work on or about December 14, 1979, and on or about January 24, 1980, to their former or substantially equivalent positions, without loss of seniority or other employment rights or privileges. We will reimburse them for all losses of pay and other economic losses they incurred because we discharged or failed to rehire them, plus interest.

WE WILL offer to reinstate all employees, then on strike, who we locked out on or about February 5, 1980, to their former or substantially equivalent positions, without loss of seniority or other rights or privileges. We will reimburse them for all losses of pay and other economic losses they incurred because we locked them out, plus interest.

Dated: MARIO SAIKHON, INC.

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is (714) 353-2130.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

APPENDIX H

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

June 15, 1986

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARTORI BROS. DISTRIBUTORS; O.P. MURPHY PRODUCE COMPANY, INC., dba O.P. MURPHY & SONS, a Texas corporation; J. R. NORTON COMPANY, an Arizona corporation; MARIO SAIKHON, INC., a California corporation,

NO. 83-1933-G(M)

Plaintiffs,

FINDINGS OF FACT AND *CONCLUSIONS OF LAW*

vs.

ALFRED SONG, Chairman; JEROME WALDIE, Board Member; PATRICK HENNING, Board Member; JOHN McCARTHY, Board Member; JORGE CARRILLO, Board Member; DAVID ARIZMENDI, Regional Director; LUPE MARTINEZ, Regional Director; AGRICULTURAL LABOR RELATIONS BOARD, STATE OF CALIFORNIA,

Defendants.

On April 30, 1984, the Court held a hearing on plaintiff's motion for summary judgment and defendants' cross-motion for summary judgment. After considering the evidence and memoranda filed, and after hearing oral argument, the Court denied plaintiffs' motion for summary judgment and granted defendants' cross-motion for summary judgment. With regard to these two motions, the Court makes the following findings of fact and conclusions of law:

1. Plaintiffs are agricultural employers in California. Each of them has been found to have violated the State's Agricultural

Labor Relations Act (ALRA or Act)[1] on one or more occasions by failing to engage in good faith collective bargaining with their employees' certified labor union.[2] These various unfair labor practice determinations were made by the California Agricultural Labor Relations Board (ALRB or Board) beginning in 1978 and continuing through 1984.

2. Defendants are the ALRB, the five appointed members of the Board, and various other Board agents. Under the ALRA, the Board is empowered to investigate and to adjudicate unfair labor practice charges, and to issue remedial orders when a violation of the Act has been found. (Cal.Lab. Code, sec. 1160-1160.3.)[3] When the Board finds that an employer has refused to bargain in good faith, the statute expressly authorizes the Board to order the wrongdoer to make its employees whole "for the loss of pay resulting from the employer's refusal to bargain..." (Cal.Lab. Code, sec. 1160.3)[4] The Board has issued one or more such "makewhole" orders against each of the plaintiffs, and the Board is in the process of determining the amounts of damages incurred by plaintiffs' employees as a result of the employers' refusals

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[1] The ALRA is found at California Labor Code sections 1140 et. seq.

[2] The employers' duty to bargain in good faith is set forth in California Labor Code, sections 1153(e) and 1155.2(a).

[3] Judicial review of the Board's unfair labor practice decisions and orders is available in the State Court of Appeal. (Cal.Lab. Code, sec. 1160.8.)

[4] Section 1160.3 provides, in pertinent part, as follows:

> ...If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, *and making employees whole, when the board decrees such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain,* and to provide such other relief as will effectuate the policies of this part...

(Emphasis added.)

to bargain.

3. In calculating the employees' "loss of pay," the Board looks to all aspects of "pay" as that term has been defined by the National Labor Relations Board (NLRB), recognizing that employee compensation generally includes not only an hourly or piece-rate wage, but also such remuneration as overtime pay, sick leave, paid vacations, holidays, rest periods, health plans, pension plans, and so forth. Accordingly, the Board determines employee damages by estimating (a) what the workers' wage rates would have been had the employer lawfully negotiated in good faith to a collective bargaining agreement; and (b) an additional percentage of wages which represents what the employees' other remuneration—the "fringe benefits"— would likely have amounted to if legitimate bargaining had occurred. The Board derives these figures by analyzing the pay packages at similarly-situated worksites where good faith bargaining has resulted in a collective bargaining agreement. (See, *J.R. Norton Company, Inc.* (1984) 10 ALRB No. 12, pp. 14-22.)

4. The plaintiffs bring this action under section 502(e) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. sec. 1132(e))—hereinafter "ERISA"—and under 28 U.S.C. sec. 2201. Plaintiffs contend that the ALRB's makewhole awards to injured workers interfere with existing employee benefit plans maintained by plaintiffs. The employers seek a judgment from this Court declaring that the "fringe benefit" element of such makewhole awards is preempted under section 514 of ERISA. (29 U.S.C. sec. 1144.) Plaintiffs further contend that the Board's remedial orders are an unconstitutional impairment of contractual obligations, and that such orders are preempted by the National Labor Relations Act (NLRA). (29 U.S.C. sec. 151, et seq.) The employers pray for a permanent injunction against the Board.

5. *Standing.* Each plaintiff maintains one or more employee welfare benefit plans and/or employee pension benefit plans as those terms are defined under ERISA, and each plaintiff acts as a fiduciary with respect to one or more such plan.

(29 U.S.C. sec. 1002.) The Court therefore finds, as a preliminary matter, that each of the plaintiffs—Martori, Murphy, Norton, and Saikhon—has standing to bring this action.

6. *Exhaustion.* The plaintiffs have not demonstrated exhaustion of their available State avenues for adjudication of their claims. However, application of the exhaustion doctrine is discretionary with the Court. *(Aleknagik Natives Ltd.* v. *Andrus* 648 F2d 496, 499-500 (9th Cir. 1980).) Under the present circumstances, it is not necessary for plaintiffs to pursue their arguments before the ALRB or the State appellate courts. (See *Shaw* v. *Delta Air Lines, Inc.* ____U.S.____ [103 S.Ct. 2890] (1983).)

7. *Abstention.* Defendants urge the Court to abstain from determining this case until the State appellate courts have had an opportunity to review the Board's interpretation of employees' "loss of pay" under section 1160.3 of the ALRA. However, plaintiffs' cause of action here is based primarily on a federal statute, ERISA, and the Court finds that abstention is neither necessary nor appropriate under these circumstances. Accordingly, the Court will address and decide the merits of plaintiffs' complaint.

8. *Impairment of Contract.* Plaintiffs' contractual rights under Article I, Section 10 of the United States Constitution are not impaired by California Labor Code section 1160.3 or by the ALRB's various decisions interpreting the makewhole damages award. The Board has merely adjudicated unfair labor practice charges, and assessed damages when employee rights have been violated. These are functions which the ALRB is properly empowered to perform. And the plaintiffs were on notice both of their collective bargaining duty (Cal.Lab. Code, secs. 1153(e) and 1155.2(a)) and of the Board's makewhole power (Cal.Lab. Code, sec. 1160.3) *before* they chose not to bargain in good faith with their workers' representative.

9. *NLRA Preemption.* The NLRA does nothing to preempt the State laws and ALRB decisions at issue here. As plaintiffs

themselves have strenuously argued, the NLRA specifically exempts agricultural employees from its coverage. (29 U.S.C. sec. 152(3).) Hence, California is free to regulate agricultural labor relations, and to remedy unfair labor practices in that context, without offending or encroaching upon the federal scheme.

10. *ERISA Preemption.* The main thrust of plaintiffs' complaint is that the ALRB's makewhole orders are preempted by ERISA for two reasons: (a) because the Board's compensatory awards allegedly "relate to" and affect existing employee benefit plans covered by ERISA; and (b) because the Board's orders allegedly create, in and of themselves, fringe benefit "plans" which come within the coverage of ERISA. Neither of these arguments has merit, and the Court finds that the ALRA and the Board's compensatory makewhole orders here are not preempted by ERISA.

a. Do the Board's orders "relate to" employee benefit plans?

Section 514(a) of ERISA (29 U.S.C. sec. 1144(a)) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall *supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(Emphasis added.) Section 514(c) (2) defines "State" for purposes of this provision:

> The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, *which*

> *purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans* covered by this subchapter.

(Emphasis added.)

Plaintiffs allege that the "fringe benefit" element of the ALRB's compensatory makewhole awards somehow interferes with the employers' existing benefit plans, allegedly imposing new terms on such plans and requiring the employers to violate the plans' existing provisions. But the Board's orders have no such effect. The makewhole awards simply do not "relate to" employee benefit plans or purport to regulate the terms and conditions of such plans within the meaning of sections 514(a) and 514(c) (2). The ALRB has not required plaintiffs to disburse any moneys from their existing plans, to add new provisions to such plans, to change existing provisions, to establish any new plans or trust funds, or to violate any of the fiduciary duties arising from existing plans.

All the ALRB has done is to find that the plaintiffs have committed unfair labor practices, and to award compensatory damages to those employees who suffered losses as a result of plaintiffs' violations. These functions do not infringe upon or purport to regulate the field occupied by ERISA.

The line of cases relied upon by plaintiffs is readily distinguishable from the present case. Plaintiffs' authorities concern state laws which plainly intruded upon ERISA's realm by (1) dictating substantive provisions of ERISA-covered benefit plans (*Shaw* v. *Delta Air Lines, Inc., supra,* 103 S.Ct. 2890 [State required specific benefits for pregnancy-related disability]; *Pervel Industries* v. *State of Conn. Etc.* 468 F.Supp. 490 (D.Conn. 1978) [same]; *Standard Oil Co. of California* v. *Agsalud* 442 F.Supp. 695 (N.D. Cal. 1977), aff'd 633 F.2d 760 (9th Cir. 1980) [State required benefits for drug

abuse].); (2) creating reporting and disclosure requirements (*Agsalud, supra,* 442 F.Supp. 695 [reporting requirements]; *Hewlett-Packard Co. v. Barnes* 571 F.2d 502 (9th Cir. 1978) [funding and disclosure requirements].); (3) regulating how benefits will be calculated in ERISA-covered plans (*Alessi* v. *Raybestos-Manhattan, Inc.* 451 U.S. 504 [101 S.Ct. 1895] (1981) [State prohibited certain offsets which were permissible under ERISA]; *Employee Benefits Committee, Etc.* v. *Pascoe* 679 F.2d 1319 (9th Cir. 1982) [Same].); (4) dictating when plans' assets are to be paid (*California Hospital Ass'n.* v. *Henning* 569 F.Supp. 1544 (C.D. Cal. 1983) [State required that unused vacation benefits be paid in cash upon workers' termination.].); (5) imposing special taxes on employee benefit plans *National Carriers' Conf. Com.* v. *Heffernan* 454 F.Supp. 914 (D.Conn. 1978).); or (6) purporting to provide remedies for non-payment of employer contributions or of plan benefits. (*Winterrowd* v. *David Freedman and Co., Inc.* 724 F.2d 823 (9th Cir. 1984) [State law provided punitive damages]; *Dependahl* v. *Falstaff Brewing Corp.* 653 F.2d 1208 (8th Cir. 1981) [State tort claim]; *Ziskind* v. *Retail Clerks* Civ. No. S-81-685 (E.D.Cal. 1982) [Same]; *Carpenters California Administrative Corp.* v. *Majestic Housing* CV-82-5085 PAR (C.D. Cal. 1983) [State statute provided mechanic's lien for delinquent contributions.].)

These cases provide no support for a finding of preemption here, where the State does nothing more than attempt to calculate the amount of damages flowing from employers' refusals to bargain in good faith. ERISA manifestly does not purport to regulate or supersede the field of agricultural labor relations and the ALRB's estimation of "loss of pay" under section 1160.3 of the Act is made without regard to the terms and conditions of employers' existing benefit plans, if any. The only reference which the ALRB makes to such existing plans is to credit the employer's contributions thereto, if any, against the gross amount of employee damages.

Even if the Board's makewhole awards did touch upon employee benefit plans in some manner, the calculation of damages would "...affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan[s]." (*Shaw* v. *Delta Air Lines, Inc., supra,* 103 S.Ct. 2890, 2901, ftn. 21.) Thus, there is no preemption.

b. Do the Board's compensatory makewhole orders themselves create an ERISA-covered plan?

The Board's makewhole award is a one-time award of employee damages, covering only that period in which the employer has failed to bargain in good faith. The ALRB has scrupulously refrained from deciding what particular benefit plans, if any, would have been effectuated pursuant to good faith bargaining, and the Board has not imposed, for example, any specific retirement plan, medical plan, vacation plan, or other benefit program. Instead, the Board merely estimates the *percentage of pay* which would likely have gone toward such benefit plans, and awards that dollar amount directly to the wrongdoer's employees, as approximate compensation for their losses. The Board's award does not result in any prospective benefits—such as vacation or retirement rights—for the recipients; and, as noted, existing plans maintained by the employers are unaffected by this award of damages.

Accordingly, the Court concludes that the "fringe benefit" percentage of the Board's remedial damages award is in no sense an "employee benefit plan" as defined by ERISA.[5] Plaintiffs' preemption claim must fail on this ground as well.

11. Based on the findings of fact and conclusions of law

[5] Note further that a plan, to be covered by ERISA, must be "established or maintained by an employer or by an employee organization, or by both..." (29 U.S.C. sec. 1002.) The administrative agency's award of compensatory damages obviously falls outside this definition.

outlined above, the Court denies plaintiffs' motion for summary judgment. Defendants ALRB et al., are entitled to summary judgment as prayed for in their cross-motion.

_____ Approved as to form.
__√__ Disapproved as to form.

Dated: June 7, 1984

/s/
Counsel for plaintiff Mario Saikhon, Inc.

_____ Approved as to form.
__√__ Disapproved as to form.

Dated: May 9, 1984

/s/
Counsel for plaintiffs Martori Bros. Dist., O.P. Murphy & Sons, and J.R. Norton Co.

Dated: June 15, 1984

/s/
HONORABLE EARL B. GILLIAM
UNITED STATES DISTRICT JUDGE

APPENDIX I

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

June 26, 1984

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARTORI BROS. DISTRIBUTORS;
O.P. MURPHY PRODUCE
COMPANY, INC., dba O.P. MURPHY
& SONS, a Texas corporation; J.R. NO. 83-1933-G(M)
NORTON COMPANY, an Arizona
corporation; MARIO SAIKHON,
INC., a California corporation,
Plaintiffs, **JUDGMENT**

v.

ALFRED SONG, Chairman;
JEROME WALDIE, Board Member;
PATRICK HENNING, Board Member;
JOHN McCARTHY, Board Member;
JORGE CARRILLO, Board Member;
DAVID ARIZMENDI, Regional Director;
LUPE MARTINEZ, Regional Director;
AGRICULTURAL LABOR
RELATIONS BOARD,
STATE OF CALIFORNIA,
Defendants.

The parties' cross-motions for summary judgment came on hearing before the Court on April 30, 1984, the Honorable Earl B. Gilliam, District Judge, presiding. The Court has considered the parties' oral arguments, as well as the pleadings, affidavits, exhibits, and memoranda which were submitted in connection with these motions, and has issued its decision herein.

IT IS ORDERED AND ADJUDGED that defentants' cross-motion for summary judgment be, and the same hereby is, granted.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' motion for summary judgment be denied, that plaintiffs' complaint be dismissed, that plaintiffs take nothing, and that defen-

dants recover their costs from plaintiffs, such costs to be divided equally among the four plaintiffs.

_____ Approved as to form.
__√__ Disapproved as to form.
Dated: June 7, 1984

/s/
Counsel for plaintiff Mario Saikhon, Inc.

_____ Approved as to form.
__√__ Disapproved as to form.
Dated: May 9, 1984

/s/
Counsel for plaintiffs Martori Bros. Dist., O.P. Murphy & Sons, and J.R. Norton Co.

Dated: June 26, 1984

/s/
HONORABLE EARL B. GILLIAM
UNITED STATES DISTRICT JUDGE

APPENDIX J

OPINION AND JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AFFIRMING DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT TO DEFENDANTS

January 30, 1986

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTORI BROS. DISTRIBUTORS, an Arizona partnership; O.P. MURPHY PRODUCE COMPANY, INC., dba O.P. MURPHY & SONS, a Texas corporation; J.R. NORTON COMPANY, an Arizona corporation; and MARIO SAIKHON, INC., a California corporation,

Plaintiffs-Appellants-Cross-Appellees

vs.

JYRL JAMES-MASSENGALE,* Chair; GREGORY L. GONOT, * Board Member: PATRICK HENNING, Board Member; JOHN McCARTHY, Board Member; JORGE CARRILLO, Board Member; REGIONAL DIRECTOR—EL CENTRO;** REGIONAL DIRECTOR—SALINAS;*** AGRICULTURAL LABOR RELATIONS BOARD, STATE OF CALIFORNIA,

Defendants-Appellees Cross-Appellants.

NOS. 84-6137
84-6274
84-6275

D.C. NO.
CV-83-1933-EBG

OPINION

Appeal from the United States District Court
for the Southern District of California
Earl B. Gilliam, District Judge, Presiding

Argued and Submitted March 7, 1985 - Pasadena

Before: BARNES and REINHARDT, Circuit Judges, and Solomon;**** District Judge

* * *

* Jyrl James-Massengale and Gregory L. Gonot have been substituted for their predecessors Alfred Song and Jerome Waldie, respectively, pursuant to Fed. R. App. P. 43(c) (1).

** The Regional Director—El Centro has been substituted for former regional director David Arizmendi pursuant to Fed. R. App. P. 43(c).

*** The Regional Director—Salinas has been substituted for former regional director Lupe Martinez pursuant to Fed. R. App. P. 43(c).

**** The Honorable Gus J. Solomon, Senior United States District Court Judge for the District of Oregon, sitting by designation.

REINHARDT, Circuit Judge:

I. BACKGROUND

A. Proceedings Below

The appellants (the Employers) are all employers of agricultural laborers. The California Agricultural Labor Relations Board (the ALRB), in several unfair labor practice proceedings, held that all of the Employers violated the Agricultural Labor Relations Act of 1975 (the ALRA), Cal. Lab. Code § 1140-1166.3 (Deering 1976 & Supp. 1985) by refusing to bargain in good faith with the union representing their employees. By way of remedy, the ALRB then ordered the employers to make their employees whole by paying them the difference between the compensaion, including wages and fringe benefits, the employees actually received, and the compensation the ALRB determined the employees would have received had the Employers bargained in good faith.

While the various cases were apparently in differing postures before the ALRB and the California Court of Appeal,[1] the

[1] The record, unfortunately, is nowhere near as clear on this point as would be desirable.

Employers filed an action in federal district court to enjoin the ALRB and certain of its officials[2] (hereafter collectively referred to as the ALRB) from enforcing the component of the "make-whole" order that deals with fringe benefits. The Employers also sought a declaration that California Labor Code § 1160.3, to the extent that it permits the ALRB to award the fringe benefit component of a "make-whole" order, is preempted by the Employee Retirement Income Security Act (ERISA), Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified at 29 U.S.C. § 1001 *et seq.*), and violates the Contract Clause (art. I, § 10, cl. 1) and the Fifth Amendment of the United States Constitution. The Employers challenge only the legality of the part of the "make-whole" order that is calculated with reference to amounts paid in the form of fringe benefits. They do not challenge the component of the "make-whole" order that is computed on the basis of the amount paid as hourly wages. The district court granted summary judgment in favor of the ALRB, and the Employers appealed.[3]

We review the grant of summary judgment *de novo*, *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). Because it is agreed that there are no contested issues of fact, we need decide only whether the substantive law was correctly applied. *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984). We hold that it was, and affirm the district court.

B. The Agricultural Labor Relations Act

The ALRB has jurisdiction under the ALRA to investigate and adjudicate unfair labor practices commiteed by agricultural workers or their employers. *See* Cal. Lab. Code § 1160-1160.3. If the ALRB determines that the ALRA has been violated, it is authorized to issue remedial orders. Cal. Lab. Code § 1160.3. Within 30 days after the ALRB issues a final order, any aggrieved person may file a petition for review with the California Court

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[2] The members of the ALRB, as well as the ALRB Regional Directors in Salinas and El Centro, were named as defendants.

[3] The ALRB cross-appealed on the ground that the district court should have abstained from hearing this case. The parties have, however, instead treated abstention as an alternative ground for affirming the district court, and we do likewise.

of Appeal. Cal. Lab. Code § 1160.8. The ALRB cannot file a petition for review, and once a petition for review has been filed the ALRB cannot move in Superior Court, as described *infra*, to enforce its order. Cal. Lab. Code § 1160.8; *Tex-Cal Land Management, Inc. v. ALRB*, 24 Cal. 3d 335, 348 n.8, 595 P.2d 579, 587 n.8, 156 Cal. Rptr. 1, 8 n.8 (1979). The Court of Appeal, when acting on a petition for review, may modify, enforce, or set aside in whole or in part, the order of the ALRB. Cal. Lab. Code § 1160.8. The Court of Appeal may also summarily deny the petition for review. *Tex-Cal Land Management*, 24 Cal. 3d at 351, 595 P.2d at 588, 156 Cal. Rptr. at 10. When considering the petition for review, the Court of Appeal must give conclusive effect to the ALRB's findings of fact if they are supported by substantial evidence on the record considered as a whole. Cal. Lab. Code § 1160.8.

If, after 30 days from the entry of a final order by the ALRB, no petition for review has been filed and the order has not been complied with, then the ALRB may apply to the California Superior Court for enforcement of its order. Cal. Lab. Code § 1160.8. If the Superior Court determines that the order was issued pursuant to ALRB procedures and that the order has not been complied with, then the Superior Court is to enforce the order without reviewing its merits. Cal. Lab. Code § 1160.8. Furthermore, if the Court of Appeal should summarily deny a petition for review, then the ALRB must wait 30 days, and if the order still has not been complied with, then it can request the Superior Court to enforce the order, as explained above. *Tex-Cal Land Management*, 24 Cal. 3d at 352, 595 p.2d at 589, 156 Cal. Rptr. at 11.[4]

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[4] It will be noted that even though the ALRA is modeled on the National Labor Relations Act (NLRA), *see Tex-Cal Land Management*, 24 Cal. 3d at 345, 595 P.2d at 584, 156 Cal Rptr. at 6, the provisions for enforcement of an ALRB order are rather different from those concerning orders of the NLRB. When the NLRB wants to enforce an order, it simply files a petition in the Court of Appeals, and the order is reviewed under a substantial evidence standard. NLRA § 10(e) (29 U.S.C. § 160(e)). The ALRB, however, can only move to enforce an order if, after 30 days from the entering of the order, no employer, union, or other aggrieved person has filed a petition for review, and then the ALRB must file in the Superior Court, which can review the procedures the ALRB followed, but not the merits of the order. Cal. Lab. Code § 1160.8. The provisions for the filing of a petition for review by an aggrieved party, however, are very

When the ALRB finds that an employer has refused to bargain, it can require the employer "to take affirmative action, including...making employees whole, when the [ALRB] deems such relief appropriate for loss of pay resulting from the employer's refusal to bargain." Cal. Lab. Code § 1160.3. The purpose of such a "make-whole" award is "to remedy [an employer's] unfair labor practice by placing the employees in the economic position they would likely have been in but for that unfair labor practice." *Robert H. Hickam,* 9 ALRB No. 6 at p.2 (1983). The ALRB has determined that as used in section 1160.3, "pay" refers "not only to cash wages paid directly to the employee, but also [to] all other benefits, capable of a monetary calculation, which flow to the employee by virtue of the employment relation." *Adam Dairy dba Rancho Dos Rios,* 4 ALRB No. 24 at p.6 (1978). Thus, when the ALRB concludes that a "make-whole" remedy is appropriate, it estimates the total value of the compensation package that the employees would have received had their employers bargained in good faith, and then subtracts the total value of the compensation package the employees actually received, to determine the amount of the "make-whole" award. *Adam Dairy*; *Robert H. Hickam.* The employer is then ordered to make a one-time, lump-sum payment in the amount of the award to the affected employees.

While various methods have been used in the past to estimate the total value of the compensation package the employees would have received had their employer bargained in good faith, *see, e.g., Adam Dairy, Robert H. Hickam, supra,* the method currently used by the ALRB is set out in *J.R. Norton Co,* 10 ALRB No. 42 (1984). The ALRB first estimates a cash wage rate by examining actual contracts that are deemed comparable to the contract that might have been reached had the employer bargained in good faith. Then, based on these comparable contracts, it determines which fringe benefits might have been included had a contract been reached, and the cash value of these benefits is added to the cash wage rate to determine the total compensation package that would have been reached had the employer bargained in good faith. The value of the total com-

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similar under both the NLRA and the ALRA. *See* NLRA § 10(f) (29 U.S.C. § 160(f)); Cal. Lab. Code § 1160.8.

pensation actually paid is then subtracted, to yield the amount of the "make-whole" award.[5]

II. JURISDICTION

The district court had subject matter jurisdiction in this action. The Employers are seeking to enjoin the enforcement of various ALRB orders on the grounds they are preempted by Federal law and are unconstitutional. Federal questions are thus presented and jurisdiction exists under 28 U.S.C. § 1331. *See Champion International Corp. v. Brown,* 731 F.2d 1406, 1407-08 (9th Cir. 1984); *Shaw v. Delta Air Lines,* 463 U.S. 85, 96 n.14 (1983).

III. ABSTENTION

The ALRB contends that even though the district court may have had jurisdiction to hear the case, it should have abstained from so doing under the doctrine enunciated in *Younger v. Harris,* 401 U.S. 37 (1971).[6] In analyzing this claim, we begin with the basic proposition that "abstention from the exercise of federal jurisdiction is the exception, not the rule." *Hawaii Housing Authority v. Midkiff,* 104 S. Ct. 2321, 2327-28 (1984). Under the *Younger* doctrine, a federal court must abstain whenever there is an ongoing state judicial proceeding, the proceeding concerns vital state interests, and there is an adequate opportunity to present the federal claims in the state proceedings. *Id.* at 2328; *Middlesex Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 432 (1982). Abstention will not be required unless the "state court proceedings [have been] initiated before any proceedings of substance on the merits have taken place in the federal court." *Hawaii Housing Authority,* 104 S. Ct. at 2328;

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[5] In some cases the calculations can be significantly more complex. *See, e.g., Robert H. Hickman, J.R. Norton Co., supra.* The essential outlines of the ALRB method, however, are set forth above.

[6] Although the ALRB did not raise the issue of *Younger* abstention below, it is appropriate for this court to decide the issue because there was no prejudice to the Employers from the delay in raising the issue. *Bellotti v. Baird,* 428 U.S. 132, 143 n.10 (1976). The ALRB has not pursued its claim, raised in the district court, that abstention was appropriate under the doctrine of *Railroad Comm'n v. Pullman,* 312 U.S. 496 (1941).

Adultworld Bookstore v. City of Fresno, 758 F.2d 1348, 1350 (9th Cir. 1985).[7]

Because the proceedings before the ALRB are not judicial proceedings, the district court was not required to abstain in deference to the ALRB.[8] *Hawaii Housing Authority,* 104 S. Ct. at 2328 (federal court should not abstain in favor of administrative proceedings); *Middlesex Ethics Committee,* 457 U.S. at 433-34 (New Jersey bar disciplinary proceedings are judicial in nature and abstention is therefore appropriate; *Miller v. Washington State Bar Association,* 679 F.2d 1313 (9th Cir. 1982) (federal court should not abstain in favor of administative bar disciplinary proceedings).[9]

The question thus becomes whether the district court was required to abstain because petitions for review were pending before the California Court of Appeal. The proceedings before the Court of Appeal clearly are judicial in nature and the Employers have a full opportunity to raise their federal claims before the Court of Appeal. The only remaining concern is whether the proceedings concern "vital state interests" within the meaning of *Younger* and its progeny.

The Supreme Court has not yet provided any type of analytical framework for determining whether, for abstention purposes, a vital

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[7] It appears that the on-going ALRB proceedings, as well as the petitions for review before the California Court of Appeal, were already pending before any proceedings of substance had taken place in the district court. *See supra* note 1.

[8] Even if we were to hold that the ALRB proceedings were judicial in nature, abstention would still not be appropriate because the Employers cannot raise their federal claims before the ALRB. Article 3, section 3.5 of the California Constitution prohibits the ALRB from declaring that a state statute is unconstitutional or preempted by federal law, unless an appellate court has already so held.

[9] In *Miller* we held that Washington state bar proceedings were administrative in nature because no appeal to the Washington Supreme Court was possible and therefore that court could not consider the attorney's constitutional challenges. 679 F.2d at 1316. By contrast, in the New Jersey state bar proceedings that were held to be judicial in nature in *Middlesex County Ethics Com'n*, the New jersey Supreme Court was *required* to consider an attorney's constitutional challenges. 457 U.S. at 435-36 & n.15.

state interest is present. An examination, however, of the cases in which this court or the Supreme Court has held that a vital state interest is present shows that the cases fall into three categories. First, there are those cases in which the state proceeding was a criminal proceeding. *See, e.g., Yonger, supra; Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *Hicks v. Miranda,* 422 U.S. 322 (1975); *Kinney v. Lenon,* 447 F.2d 596 (9th Cir. 1971) (juvenile proceedings); *Rivera v. Freeman,* 469 F.2d 1159 (9th Cir. 1972) (same). The second category consists of those cases in which the state proceeding was in aid of or closely related to a criminal proceeding. For example, in *Huffman v. Pursue, Ltd.,* 420 U.S 592 (1975), the Supreme Court held that a state nuisance abatement action against a theater alleged to be showing criminally obscene movies was sufficiently in aid of and related to a criminal prosecution that abstention was appropriate. We relied on *Huffman* in holding that an action for unfair and deceptive trade practices brought by the state under a consumer protection act was sufficiently related to or in aid of the state's criminal law. *Williams vs. Washington,* 554 F.2d 369 (9th Cir. 1977). Similarly, in *Trainor v. Hernandez,* 431 U.S. 434 (1977), the Supreme Court held that the federal courts should abstain in favor of a civil suit brought by the state to recover welfare benfits fraudulently received, noting that the state could have filed criminal charges instead of the civil claim. We followed *Trainor* in ordering abstention in favor of a state receivership involving the investigation and regulation of fraud in charitable trusts. *Worldwide Church of God v. California,* 623 F.2d 613 (9th Cir. 1980) (per curiam). Likewise, in *Moore v. Sims,* 442 U.S. 415 (1979), the Supreme Court held that a suit by the state to temporarily remove children form the custody of their parents pending a determination of whether the children were being abused was sufficiently related to and in aid of criminal proceedings that abstention was appropriate.

The third category where abstention has been found appropriate consists of those cases where the state proceedings involve the fundamental operation of the state's court system. Thus, in *Juidice v. Vail,* 430 U.S. 327 (1977), the Supreme Court ordered abstention in favor of a state court contempt proceeding, pointing out that "[t]he contempt power lies at the core of the administration of a State's judicial system." *Id.* at 335. *See Henkel v. Bradshaw,* 483 F.2d 1386 (9th Cir. 1973) (abstention in favor of state contempt pro-

ceedings). Similarly, both this court and later the Supreme Court have held that abstention is appropriate when a state bar disciplinary action is judicial in nature. *See Middlesex County Ethics Committee, supra; Rosenthal v. Carr,* 614 F.2d 1219 (9th Cir.), *cert. denied,* 447 U.S. 927 (1980). The importance of professional, ethical conduct by attorneys to the functioning of the court system has been repeatedly emphasized by the courts. *See, e.g., Middlesex County Ethics Committee,* 457 U.S. at 434 (abstention issues); *Theard v. United States,* 354 U.S. 278, 281 (1957); *Erdmann v. Stevens,* 458 F.2d 1205, 1209 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972) (abstention issues).[10]

Clearly, the Employers' petitions for review before the California Court of Appeal are not criminal proceedings, nor do they involve the fundamental operation of California's court system. The petitions for review are civil proceedings; because California Labor Code § 1160.9 provides that chapter 6 of the ALRA (§ 1160-1160.9) is "the exclusive method of redressing unfair labor practices" and chapter 6 contains no criminal provisions at all, we simply cannot say that a petition for review of an ALRB decision is in aid of or related to criminal proceedings. Accordingly, a petition for review does not fall into any of the three categories in which *Younger* abstention has been held to be appropriate.

We have made it clear that our "unflagging obligation" to exercise federal jurisdiction precludes expansion of the *Younger* doctrine except in extraordinary circumstances. *Miofsky v. Superior Court,* 703 F.2d 332, 338 (9th Cir. 1983). The state's interest under the ALRA would seem to be the quite common interest which underlies any regulatory statute enacted by a state with the purpose of improving the economic conditions of its residents. Because this

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[10] It may also be possible to characterize the bar discipline cases as cases involving proceedings related to or in aid of criminal proceedings. While the Supreme Court in *Middlesex County Ethics Committee* explicitly refused to decide whether New Jersey's disciplinary proceedings were criminal, quasi-criminal, or civil in nature, *see* 457 U.S. at 433 n.12, the Court has in other contexts referred to bar disciplinary proceedings as quasi-criminal, *see, e.g., In re Ruffalo,* 390 U.S. 554, 561 (1968), and at least some of the circuit courts that have held that abstention is appropriate have emphasized the quasi-criminal nature of bar disciplinary proceedings. *See, e.g., Erdmann, supra.*

interest is so common, we are constrained to hold that it is not anywhere as "vital" as the state's interest in its criminal justice system or the fundamental operation of its court system, and thus that it is not sufficiently "vital" to justify an expansion of the *Younger* doctrine. *See Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984) (Montana did not have vital state interest in enforcing age discrimination laws). A contrary holding would strip the phrase "extraordinary circumstances" of meaning and would readily lead to a rule that *Younger* abstention is required any time *any* state interest is present. We cannot violate our clear obligation to exercise federal jurisdiction. Accordingly we hold that the district court was correct in refusing to abstain.[11]

IV. ERISA PREEMPTION

We turn now to the principal question before us—whether the ALRB's order is preempted because the "make-whole" remedy is based on the entire compensation package received by farm workers rather than solely on the hourly wages they receive.

Section 514(a) of ERISA (29 U.S.C. § 1144(a) (1982)) states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[12] "State law"

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[11] We also not that a number of circuits have held that *Younger* abstention is not appropriate when the state is not the plaintiff in the state court action. *See, e.g., New Jersey Education Association v. Burke*, 579 F.2d 764 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978); *Johnson v. Kelly*, 583 F.2d 1242 (3d Cir. 1978); *Harris v. Pernsley*, 755 F.2d 338 (3d Cir. 1985); *Puerto Rico International Airlines v. Silva Recio*, 520 F.2d 1342 (1st Cir. 1975); *Henry v. First National Bank*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *Crawley v. Hamilton County Commissioners*, 744 F.2d 28 (6th Cir. 1984); *Anderson v. Babb*, 632 F.2d 300, 306 n.3 (4th Cir. 1981). *But see Etlin v. Dalton*, 673 F.2d 1309 (4th Cir. 1981) (mem.), *cert. denied*, 458 U.S. 1112 (1982). Of course, in *Juidice, supra*, the state was not a party to the state proceedings at all, but the Supreme Court was careful to point out that the private litigant who initiated the state contempt proceedings was directly furthering the state's interest in the orderly operation of its courts. 430 U.S. at 335-36 & n.12. We need not rely here on the ground that the state was not the plaintiff.

[12] None of the parties contends that the employee benefit plans involved in this case are exempted from ERISA under § 4(b) (29 U.S.C. § 1003(b)) and thus not covered by the preemption clause of § 514(a).

is a defined term and consists of "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." § 514(c) (1). "State" is also a defined term and includes "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 514(c) (2). Thus, not only section 1160.3 of the California Labor Code, but also the ALRB interpretations of that section constitutes "State law." *See, e.g., Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985), *Scott v. Gulf Oil Co.*, 754 F.2d 1499 (9th Cir. 1985). We must therefore determine whether California Labor Code § 1160.3, as interpreted and implemented by the ALRB, is preempted by ERISA.[13] Section 1160.3 is preempted if it both "relate[s]" to an ERISA plan and "purport[s] to regulate, directly or indirectly" ERISA plans. *See Lane*, 743 F.2d at 1339; *Rebaldo v. Cuomo*, 749 F.2d 133, 137 & n.1 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2702 (1985).[14]

We have recognized that while the scope of section 514(a) is broad, it is not all-encompassing. *See, e.g., Scott*, 754 F.2d at 1504; *Lane*, 743 F.2d at 1340. As the Supreme Court noted, "Some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21. Furthermore, "[w]e must also presume that [in enacting ERISA] Congress did not intend to preempt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S. Ct. 2380, 2389 (1985).

The state laws that have been found to be preempted by section 514(a) because they "relate" to ERISA plans fall into four categories. First, laws that regulate the type of benefits or terms of ERISA

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[13] None of the parties contends that any of the exceptions to § 514(a) listed in § 514(b) applies in this case.

[14] *See also Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983) (state law must both "relate to" and "purport to regulate" ERISA plans before it is preempted); *Sasso v. Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359, 494 N.Y.S.2d 856 (1985) (same).

plans.[15] Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans.[16] Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans.[17] Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the

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[15] *See, e.g., Shaw v. Delta Airlines,* 463 U.S. 85 (1983) (pregnancy benefits required); *Standard Oil Co. v. Agsalud,* 633 F.2d 760 (9th Cir. 1980), *aff'g* 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd mem.* 454 U.S. 801 (1981) (alcohol and drug abuse treatment benefits required); *Pervel Industries v. Connecticut C >mm'n on Human rights,* 468 F. Supp. 490 (D. Conn. 1978), *aff'd mem.* 603 I 2d 214 (2d Cir. 1979), *cert. denied,* 444 U.S. 1031 (1980) (pregnancy benefits required); *Dawson v. Whaland,* 529 F. Supp. 626 (D.N.H. 1982) (health benefits required); *General Split Corp. v. Mitchell,* 523 F. Supp. 427 (E.D. Wis. 1981) (conversion and other benefits required); *St. Paul Electrical Workers Welfare Fund v. Markman,* 490 F. Supp. 931 (D. Minn. 1980) (various medical benefits required); *but see also Metropolitan Life Ins. Co. v. Massachusetts,* 105 S. Ct. 2380 (1985) ("insurance exception" in § 514(b) (2) (A) prevents preemption of state law generally requiring insurance companies to offer certain medical benefits).

See further Davis v. Line Construction Benefit Fund, 589 F. Supp.146 (W.D. Mo. 1984) (ERISA plan can properly require beneficiary to assign rights of recovery to plan as precondition for receipt of benefits even though state law prohibits such assignment); *Hunt v. Sherman,* 345 N.W.2d 750 (Minn. 1984) (same).

[16] *See, e.g., Standard Oil Co. v. Agsalud,* 633 F.2d 760 (9th Cir. 1980)), *aff'g* 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd mem.* 454 U.S. 801 (1981) (reporting requirements); *Hewlett Packard Co. v. Barnes,* 571 F.2d 502 (9th Cir. 1978), *aff'g* 425 F. Supp. 1294 (N.D. Cal. 1977), *cert. denied,* 439 U.S. 831 (1978) (funding & disclosure requirements); *Stone & Webster Engineering Corp. v. Ilsley,* 690 F.2d 323 (2d Cir. 1982), *aff'd mem. sub nom. Arcudi v. Stone & Webster Engineering Corp.,* 463 U.S. 1220 (1983) (funding requirements); *St. Paul Electrical Workers Welfare Fund v. Markman,* 490 F. Supp. 931 (D. Minn. 1980) (reporting requirements; *Azzaro v. Harnett,* 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd mem.* 553 F.2d 93 (2d Cir.), *cert. denied,* 434 U.S. 824 (1977) (ERISA prevents state insurance department from inquiring into pension benefit status of participant); *National Carriers' Conference Comm. v. Hefferman,* 454 F. Supp. 914 (D. Conn. 1978) (state cannot tax ERISA plans because taxation is a form of regulation).

[17] *See, e.g., Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981) (use of setoff/integration method in computing benefits); *Employee Benefits Comm. v. Pascoe,* 679 F.2d 1319 (9th Cir. 1982) (same);*Kapuscinski v. Plan Administrator,* 658 F.2d 427 (6th Cir. 1981)) (same).

ERISA plan. [18] The principle underlying all of these decisions would appear to be that the state law is preempted by section 514(a) if the conduct sought to be regulated by the state law is "part of the administration of an employee benefit plan"; that is, the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans. *See Scott,* 754 F.2d at 1505.

The Employers' first argument in support of a finding of preemption is that the portions of the ALRB's "make-whole" awards that are calculated by examining fringe benefits in comparable contracts alter the terms of the Employers' already existing ERISA plans. This argument is factually incorrect. ALRB "make-whole" orders do not require any change whatsoever in existing ERISA plans. Nor does the money the Employers are ordered to pay to their employees under the terms of the order come out of ERISA trust funds. A "make-whole" order is no more than an order to the Employers to pay damages to their employees; it is no different from any other award of damages.

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[18] *See, e.g., Ellenburg v. Brockway, Inc.,* 763 F.2d 1091 (9th Cir. 1985) (state law claim of breach of implied covenant of good faith and fair dealing); *Scott v. Gulf Oil Corp.,* 754 F.2d 1499 (9th Cir. 1985)) (ERISA preempts certain state common-law claims for breach of contract, violation of public policy, breach of duty to act fairly and in good faith, breach of fiduciary duty, and fraud); *Blau v. Del Monte Corp.,* 748 F.2d 1348 (9th Cir. 1984), *cert. denied,* 106 S. Ct. 183 (1985) (state common-law claims for breach of contract, estoppel, fraud, and deceit); *Winterrowd v. David Freeman & Co.,* 724 F.2d 823 (9th Cir. 1984) (punitive damages); *Lafferty v. Solar Turbines Int'l,* 666 F.2d 408 (9th Cir. 1982) (common law breach of contract claim); *Holland v. Burlington Industries,* 772 F.2d 1140 (4th Cir. 1985), (ERISA preempts state law regulating time of payment of employee benefits, and various common law claims); *Gilbert v. Burlington Industries,* 765 F.2d 320 (2d Cir. 1985) (same); *Authier v. Ginsberg,* 757 F.2d 796 (6th Cir.), *cert. denied,* 106 S. Ct. 208 (1985) (ERISA preempts state-law claim for wrongful discharge where public policy violated by discharge was established by ERISA); *Dependahl v. Falstaff Brewing Corp.,* 653 F.2d 1208 (8th Cir.), *cert. denied,* 454 U.S. 968 (1981) (state claim for tortious interference with contractual relations); *Provience v. Valley Clerks Trust Fund,* 163 Cal. App. 3d 249, 209 Cal. Rptr. 276 (1984) (various state tort claims); *Baker v. Caravan Moving Corp.,* 561 F. Supp. 337 (N.D. Ill. 1983) (ERISA preempts state law penalties for failure to contribute to employee benefit plans); *Trustees of Sheet Metal Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc.,* 559 F. Supp. 561 (E.D.N.Y. 1983) (same); *Commonwealth v. Federico,* 383 Mass. 485, 419 N.E.2d 1374 (1981) (same).

The Employers' second argument in support of preemption is that the portions of the ALRB's "make-whole" awards that are calculated by examining fringe benefits in comparable contracts are preempted because they create new ERISA plans. It is difficult to see how the making of one-time lump sum payments could constitute the establishment of a plan. As discussed above, a "make-whole" remedy is an award of damages designed to put workers in approximately the same economic position they would have been in had their employer bargained in good faith. This economic position can be determined only after determining the total compensation the workers would have received after good-faith bargaining. The total compensation paid to any worker in normal circumstances may be paid partly in wages and partly in fringe benefits. The specific mix of wages and fringe benefits is irrelevant for the purpose of assessing damages. Regardless of the particular mix, the total value of the compensation package remains the same; if the amount of fringe benefits is greater, the amount of wages will be lesser, and vice-versa. When the ALRB decides to issue a "make-whole" award, it is only the total amount

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Aberdeen Blower & Sheet Metal Workers, Inc., 559 F. Supp. 561 (E.D.N.Y. 1983) (same); *Commonwealth v. Federico*, 383 Mass. 485, 419 N.E.2d 1374 (1981) (same).

But see also Dedeaux v. Pilot Life Ins. Co., 770 F.2d 1311 (5th Cir. 1985) ("insurance exception" of 514(b)(2)(A) prevents preemption of common-law claims for breach of contract, breach of fiduciary duty, and fraud with respect to insurance-funded ERISA plan); *Sasso v. Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359, 494 N.Y.S.2d 856 (1985) (ERISA does not preempt state law making shareholders liable to employees for corporate employer's failure to pay amounts owing to employees, because law "relates to" shareholder immunity, not ERISA plans).

We note that many of the Ninth Circuit cases cited in this note rely on *Russell v. Massachusetts Mutual Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 3085 (1985). We have vacated our opinion in *Russell*, however, 778 F.2d 542 (9th Cir. 1985), and thus it no longer has precedential value.

See County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979). *See also Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 211 (7th Cir. 1985) (after Supreme Court decision in *Russell*, the extent of preemption of state common-law claims by ERISA-plan beneficiaries is "a difficult and unresolved question.").

of compensation that matters. The ALRB does not order the payment of fringe benefits; rather, it requires the payment of damages in an amount equal to the difference between the estimated total value of the compensation package the employees should have received and the amount of compensation they actually received. Because the ALRB is not ordering the payment of fringe benefits, there is not even a colorable argument that it has created new ERISA plans, and the Employers' second argument must fail.

Our conclusion in this regard is supported by our prior cases of *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group*, 721 F.2d 654 (9th Cir. 1983), and *Scott v. Gulf Oil Co.*, 754 F.2d 1499 (9th Cir. 1985), in which we held that damages awarded for injuries suffered due to wrongful exclusion from an ERISA plan were not benefits under an ERISA plan. In the case before us, the agricultural workers are reciving damages for wrongful failure to pay the proper total compension; *a fortiori* these damages are not ERISA benefits.

The Employers' third argument in support of a finding of preemption is that the portions of the ALRB's "make-whole" awards that are calculated by examining fringe benefits in comparable contracts are preempted because the calculations are made by reference to existing ERISA plans. We do not believe that Congress intended the "relates to" clause of section 514(a) to be read so broadly. Such an expansive reading of ERISA would lead to absurd results. For example, if the victim of an accident was unable to work and sought damages for lost income, under the Employers' theory the damages could be measured only by lost wages, and could not include any amount attributable to the loss of fringe benefits. We seriously doubt that Congress intended to alter so drastically the method of calculating damages in state personal injury suits when it enacted pension reform legislation designed to benefit employees. Moreover, even if we concluded that ALRB "make-whole" orders do affect ERISA plans, we would not invalidate them. Rather we would conclude that such orders affect the plans in too remote, tenuous, and peripheral a manner to justify a holding that they "relate to" the plans. Our conclusion that ERISA does not prevent the calculation of damages for lost compensation by referring to existing ERISA plans is but-

tressed by the holding of *Scott* and *Freeman* that damages suffered because of wrongful exclusion from an ERISA plan can properly be calculated by examining actual ERISA plans. Thus, we reject the Employers' third argument.

Accordingly, we hold that California Labor Code § 1160.3 does not "relate to any employee benefit plan."

We have held, as has the Second Circuit, that under section 514(c) (2) a state law must also "purport to regulate" ERISA plans before it can be held to be preempted. *Lane*, 743 F.2d at 1339; *Rebaldo*, 749 F.2d at 137 & n.1.[19] This second prong of the preemption test seems to have been over-shadowed by the "relates to" test found in section 514(a), although the two prongs are both important. *See Lane*, 743 F.2d at 1339; Rebaldo, 749 F.2d at 137 ("purport to regulate" test imposes a limit on the reach of the preemption clause in ERISA). As a logical matter, if a state law does not "relate to" ERISA plans, it cannot "purport to regulate" them, for "relates" includes, but is much broader than, "purports to regulate." Thus, we conclude that, *a fortiori*, California Labor Code § 1160.3 does not "purport to regulate" ERISA plans.

We see then, that neither of the two preconditions to preemption is satisfied in this case. This conclusion, drawn from the words of the statute, is reinforced by an examination of the legislative history of ERISA. As we have pointed out, Congress in enacting ERISA was mainly concerned with two abuses: "mismanagement of funds accumulated to finance [employee] benefits, and failure to pay employees the benefits promised." *California Hospital Association v. Henning*, 770 F.2d 856, 859 (9th Cir. 1985). Congress was not concerned, when it enacted ERISA, with the multitude of problems surrounding employers who refused to

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[19] The structure of § 514 is somewhat unusual. Section 514(a) preempts "State laws" that "relate to" ERISA plans. Section 514 (c) (1) defines "State law" as the "laws ... of any State." Section 514(c) (2) defines a "State" to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." Thus, as both *Lane* and *Rebaldo* expressly held, in order for a law to be a "State law," the law must "purport to regulate" ERISA plans.

bargain in good faith.

We cannot ignore the reality that when Congress enacted ERISA, "federal exclusivity [was] a collary of regulatory coverage, not an independent statutory goal." *California Hospital Association,* 770 F.2d at 861. ERISA does not purport to regulate the broad spectrum of unlawful employment practices that may be committed by employers: thus ERISA does not prevent a state agency from including in its "make-whole" awards sums calculated with reference to fringe benefits.

V. CONTRACT CLAUSE

The Employers argue that U.S. Const. Art. I, 10, cl. 1, which provides that "No State shall ... pass any Law inpairing the Obligation of Contracts," bars the enforcement of a "make-whole" remedy on the ground that the "make-whole" award would alter the terms of their already existing ERISA plans. As we have shown above, the "make-whole" award does not alter the terms of the existing ERISA plans and is not itself an employee benefit plan. Thus, there is no impairment of the employers' ERISA plans and no violation of the Contract Clause. *See Northwestern National Life Insurance Co. v. Tahoe Regional Planning Agency,* 632 F.2d 104, 106 (9th Cir. 1980).

VI. FIFTH AMENDMENT — TAKINGS

The Employers' argument that enforcement of a "make-whole" remedy constitutes a taking of their assets and thus violates the just compensation clause of the Fifth Amendment borders on the frivolous. If taken seriously, the Employers' position would compel the dismantling of our civil litigation system since damages could no longer be awarded by our courts.

VII. CONCLUSION

Because we conclude that the district court had jurisdiction and properly refused to abstain, and that neither ERISA, the Contracts Clause, nor the Fifth Amendment prevents the ALRB from calculating a portion of its "make-whole" awards on the basis of benefits afforded under existing ERISA plans, we affirm the

district court's grant of summary judgment to the defendants.

AFFIRMED

APPENDIX K

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

April 1, 1986

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Martori Brothers Distributors, *et al.*, Plaintiffs/Appellants/ Cross Appellees,	Nos. 84-6137 84-6274 84-6275
v.	D.C. No. CV-83-1933-EBG
Jyrl James-Massengale, *et al.*, Defendants/Appellees/ Cross-Appellants.	**ORDER**

Before: BARNES and REINHARDT, Circuit Judges, and SOLOMON,* District Judge

The opinion filed in this case on January 30, 1986, is amended as follows:

At page 5, line 25 - page 6, line 3, the sentence reading "Furthermore, if the Court . . . explained above." is deleted and replaced by:

> Furthermore, if the Court of Appeal should summarily deny a petition for review, and the ALRB's order is not then complied with, the ALRB must request the Superior Court to enforce the order.

At page 7, line 1, a footnote is added at the end of the sentence and reads as follows:

> While a "make-whole" order does require the employer to continue to make its employees whole until such time as it bargains in good faith, the practice of the ALRB appears to be to fix specific

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* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

beginning and ending dates and calculate the "make-whole" amount for that period. The award is the final award for that period. Then, if it is later determined that the employer continued to act in bad faith, a new ending date is fixed, and a new award is made, covering the period from the first ending date to the new ending date. Thus, a lump-sum award is made for each period. *See J. R. Norton Co.*, 10 ALRB No. 42 at p. 8 n.8 (1984); *Adam Dairy, supra*, at pp. 17-18 (ALRB rejects suggestion that employers make ongoing payments indefinitely); *Robert H. Hickam*, Case No. 4 ALRB No. 73, Decision of the Administrative Law Officer at p. 14 (Nov. 19, 1981).

APPENDIX L

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

June 12, 1986

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTORI BROS. DISTRIBUTORS, *et al.*,
Plaintiffs/Appellants/
Cross Appellees,
v.

Jyrl James-Massengale, *et al.*,
Defendants/Appellees/
Cross-Appellants.

Nos. 84-6137
84-6274
84-6275

D.C. No.
CV-83-1933-EBG

ORDER

Before: BARNES and REINHARDT, Circuit Judges, and SOLOMON,* District Judge

The opinion filed in this case on January 30, 1986, as amended April 1, 1986, 781 F.20 1349, is further amended as follows:

The paragraph beginning with "We have made it clear...," 781 F.2d at 1355, slip op. at 14, and ending with "... refusing to abstain.[12]", 781 F.2d at 1356, slip op. at 14, is deleted and replaced by:

> We recognize that the state's interest in the ALRA is substantial. The Act itself explicitly and eloquently sets forth California's interest:
>
> > Sec. 1. In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.

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* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

> This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state. The Legislature recognizes that no law in itself resolves social injustice and economic dislocations.
>
> However, in the belief the people affected desire a resolution to this dispute and will make a sincere effort to work through the procedures established in this legislation, it is the hope of the Legislature that farm laborers, farmers, and all the people of California will be served by the provisions of this Act.

Agricultural Labor Relations Act of 1975, Cal. Stats. 1975, Third Extraordinary Session, c.1 § 1 at 4013.

The ALRA furthers California's policy of promoting freedom of association, "free from the interference, restraint, or coercion of employers of labor..." Cal. Lab. Code § 1140.2 (West Supp. 1986).

However, we have made it clear that our "unflagging obligation" to exercise federal jurisdiction precludes expansion of the *Younger* doctrine except in extraordinary circumstances. *Miofsky v. Superior Court*, 703 F.2d 332, 338 (9th Cir. 1983); *see also Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 542 (9th Cir. 1985); *Silberkleit v. Kantrowitz*, 713 F.2d 433, 435 (9th Cir. 1983). We have previously declined to extend *Younger's* reach to encompass other concededly important interests. *See Champion International Corp. v. Brown* 731 F.2d 1406 (9th Cir. 1984) (Montana's interest in enforcing age discrimination laws, not a vital state interest in the context of *Younger* abstention doctrine). Although admittedly the state's interest is important it is not qualitatively as vital or central to the state's interest as is its interest in its criminal justice system or the fundamental operation of its court system. We decline to extend *Younger* here, since a contrary holding would diminish the significance of the phrase "extraordinary circumstances" and readily lead to a rule that *Younger* abstention is required any time the state demonstrates

a clear interest. We cannot violate our clear obligation to exercise federal jurisdiction. Accordingly, we hold that the district court was correct in refusing to abstain.

APPENDIX M

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

June 24, 1986

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Martori Brothers Distributors, *et al.*,
Plaintiffs/Appellants/
Cross Appellees,

vs.

Jyrl James-Massengale, *et al.*,
Defendants/Appellees/
Cross-Appellants.

Nos. 84-6137
84-6274
84-6275

D.C. No.
CV-83-1933-EBG

ORDER

Before: BARNES and REINHARDT, Circuit Judges, and SOLOMON,* District Judge

The panel has voted to deny all petitions for rehearing. Judge Reinhardt voted to reject all the suggestions for rehearing en banc. Judges Barnes and Solomon have no vote on those suggestions but indicated that they favored accepting appellees' suggestions because of a potential conflict suggested by another judge. That conflict has since been resolved.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on any suggestion for rehearing en banc. Fed. R. app. P. 35 (b).

The petitions for rehearing are denied and the suggestions for en banc rehearing are rejected.

APPENDIX N

ERISA § 514, 29 USC § 1144

EFFECT ON OTHER LAWS
SEC. 514

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b) (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which ocurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(5) (A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt

from subsection (a)—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6) (A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not full insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United State applicable to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

APPENDIX O

CALIFORNIA LABOR CODE § 1160.3

1160.3. Taking of Testimony; Orders of Board
(1975 Third Extra Session ch.1)

The testimony taken by such member, agent, or agency, or the board in such hearing shall be reduced to writing and filed with the board. Thereafter, in its discretion, the board, upon notice, may take further testimony or hear argument. If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part. Where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon the preponderance of the testimony taken, the board shall be of the opinion that the person named in the complaint has not engaged in or is not engaging in any unfair labor practice, the board shall state its findings of fact and shall issue an order dismissing the complaint. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the board, or before an administrative law officer thereof, such member, or such administrative law officer, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the board, and, if no exceptions are filed within 20 days after service therof upon such parties, or within such further period as the board may authorize, such recommended order shall become the order of the board and become effective as therein prescribed.

Until the record in a case shall have been filed in a court, as provided in this chapter, the board may, at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

APPENDIX P

INTERNAL REVENUE SERVICE
LETTER RULING # 8052103

IRS LETTER RULINGS REPORT

LTR 8052103, October 3, 1980
Symbol: T:I:WEA:2:2

[Code Sections 3121, 3306 and 3401]

Wages; Back pay; Discrimination complaint settlement.—CCH.

This is in reply to your letter of July 9, 1980, in which you request a ruling as to whether, under the circumstances described below, a payment made in settlement of claimed discrimination under Title VII of the Civil Rights Act of 1964 is "wages" for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages.

The facts, as submitted, are as follows. Recently, one of your employees filed a complaint against you with the Equal Employment Opportunity Commission (EEOC) claiming discrimination in employment under Title VII of the Civil Rights Act of 1964. A Negotiated Settlement Agreement was reached as to the amount due the employee for back wages plus an amount representing a sum that would have vested to the employee from your Hourly Employees' Pension Plan if the employee had not terminated employment. (At the time of termination, no amount was either paid to or vested in the employee because of the forfeiture provisions of the pension plan.) Although not specifically stated in the Negotiated Settlement Agreement, all parties involved clearly understood that the $9,500 settlement payment represented $3,500 for back wages and $6,000 for "lost" pension benefits. The complaint filed by the employee did not allege personal injury, nor was personal injury considered by the parties in reaching the $9,500 settlement. You have already paid the $9,500 to the employee in a lump sum after withholding the appropriate amount of income and employee FICA taxes (which are currently being held in escrow pending issuance of this ruling).

Section 3121(a) of the FICA and section 3306(b) of the FUTA define the term "wages," with certain exceptions not here material, as "all remuneration . . . for services performed by an employee

for his employer..." Upon comparison with the conclusions reached in Revenue Ruling 72-341, 1972-2 C.B. 32 and Revenue Ruling 78-176, 1978-1 C.B. 303, and the circumstances considered therein, we have determined that the entire $9,500 payment to your employee is "wages" for FICA, FUTA, and federal income tax withholding purposes. In this regard, the fact that the payment in question was made pursuant to a negotiated settlement, and not under a "decree" or "order," is not a material distinction between the instant situation and the circumstances considered in the cited Revenue Rulings. Moreover, that portion of the settlement amount which represents "lost" pension benefits is, in reality, an amount *in lieu* of such benefits and there are no exceptions from "wages" applicable to direct cash payments of this type.

APPENDIX Q

INTERNAL REVENUE SERVICE
LETTER RULING # 7851085

IRS LETTER RULINGS REPORT

LTR 7851085, September 22, 1978
Symbol: T:I:WEA:2:2

[Code Sections 3121 and 3401]

Withholding of tax on wages; Back pay; Amount received as settlement of Title VII lawsuit.—CCH.

In your letter of May 8, 1978, you request a ruling concerning whether certain payments you received from Company M are wages for purposes of the Federal Insurance Contributions Act (FICA) and federal income tax withholding.

The information submitted indicates that you were employed by Company M and participated in Company M's profit sharing plan (the Plan). Contributions to each participant's account in the Plan are based on the wages each employee earns. In June 1972 a lawsuit was brought against your employer alleging that female employees were receiving less money per hour than male employees doing the same work, in violation of Title VII of the Civil Rights Act of 1964. In March, 1977, you resigned from employment due to ill health. After your resignation, you received a lump sum payment of your vested interest from the Plan.

In March 1978, an agreement was reached with Company M to settle the lawsuit out of court. You state that you received **z** dollars as part of the settlement, including **x** dollars for back pay and **y** dollars for contributions to the Plan that should have been made on your behalf. Company M treated the entire settlement payment of **z** dollars as wages for FICA and federal income tax withholding purposes.

You request a ruling whether the part of the settlement payment that was designated as payment for contributions to the Plan that should have been made on your behalf (or **y** dollars) was correctly treated as wages for federal income tax withholding and FICA purposes.

The FICA imposes taxes on "wages," as that term is defined in section 3121(a) of the Internal Revenue Code. Section 3402(a) requires that employers withhold federal income tax on payments of "wages" (defined in section 340-1(a)).

Revenue Ruling 72-341, 1972-2 C.B. 32, states that payments by a corporation to its employees resulting from a suit for violation of Title VII of the Civil Rights Act of 1964 are includible as compensation in the employees' gross income and are wages for federal employment tax purposes.

Sections 3121(a)(5)(A) and 3401(a)(12)(A) of the Code except from the definition of wages any payment made to, or on behalf of, an employee or his beneficiary "from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust." These provisions generally except from wages payments made to or from an exempt profit sharing plan.

The payment of y dollars was made directly to you, and therefore the payment was not made "from or to a trust described in section 401(a)..." Therefore, the exceptions from wages provided by section 3121(a)(5)(A) and 3401(a)(12)(A) of the Code do not apply to the payment. The general principle set forth in Revenue Ruling 72-341 would apply to the payment of y dollars.

Therefore, we conclude that the payment of y dollars was wages subject to FICA taxes and federal income tax withholding.

(3)

Supreme Court, U.S.
FILED
OCT 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-464

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1986

MARTORI BROS. DISTRIBUTORS, et al.,

Petitioners

v.

JYRL JAMES-MASSENGALE, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below correctly characterized California's compensatory "makewhole" remedy, designed to reimburse agricultural employees for losses suffered as a result of an employer's unlawful refusal to bargain, as "an award of damages" rather than a State-created ERISA[1/] plan.

2. Whether the Court of Appeals was correct in giving weight and effect to all words contained in section 514(a) of ERISA, rather than considering the words "relate to" in isolation.

3. Whether the court below correctly determined that Congress, in passing ERISA, did not intend to

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1. Employee Retirement Income Security Act (29 U.S.C. sec. 1001 et.seq.).

prevent a state agency from fully and fairly remedying violations of the collective bargaining duty imposed by state statute.

4. Whether the Court of Appeals' opinion below conflicts with ERISA preemption cases decided by this Court under fundamentally different facts.

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REASONS FOR DENYING THE WRIT

Summary of Argument

The Court of Appeals' interpretation of the scope and purpose of section 514 of ERISA is correct.

Petitioners object to the court's holding that preemption can only be found where a defendant "purports to regulate directly or indirectly, the terms and conditions of employee benefit plans." Yet that requirement is dictated by ERISA itself in section 514(c)(2), and has previously been recognized by this Court and other appellate courts.

Petitioners further claim that the opinion below is in direct conflict with three decisions of this Court. Yet an examination of those cases reveals that they concerned very different facts; the challenged state laws therein manifestly purported to regulate ERISA plans, and therefore satisfied the element of

preemption which petitioners seek to eliminate from ERISA. In contrast, the California laws challenged here -- the State's collective bargaining statute and the ALRB's[2/] compensatory "makewhole" remedy for certain bargaining violations -- do not purport to regulate ERISA plans in any fashion. Though petitioners seriously mischaracterize those laws in their attempt to construct a case for preemption, the Court of Appeals correctly concluded, after due consideration, that their claim has no merit and that their expansive theory of preemption would lead to unfair and absurd results.

Even if petitioners had, arguendo, established a state law which purported to regulate the terms and conditions of ERISA plans, the same result affirmed by the Court of Appeals -- summary judgment for

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2. Agricultural Labor Relations Board.

defendants -- would obtain. This is so because collective bargaining statutes like the California ALRA[3/] are exempt from ERISA's preemption provision. ERISA, corresponding provisions of the Internal Revenue Code, and court decisions interpreting section 514 all contemplate that employees' collective bargaining rights will not be diminished by ERISA. Petitioners' preemption theory would undermine those rights, encourage unfair labor practices, impoverish innocent employees, and guarantee the unjust enrichment of wrongdoers.

For these reasons, respondents submit that the court below correctly interpreted and applied ERISA's preemption provisions, and correctly rejected petitioners' various arguments. Accordingly, the petition should be denied.

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3. Agricultural Labor Relations Act. (California Labor Code sections 1140 et seq.)

I

THE DECISION BELOW IS PERFECTLY CONSISTENT WITH THIS COURT'S INTERPRETATIONS OF ERISA PREEMPTION

A. The Court of Appeals Properly Considered The Entirety of ERISA Section 514(a), Rather Than Isolating Two Words Out of Context As Petitioners Propose.

As the Court of Appeals correctly noted, plaintiffs' ERISA preemption claim here was based exclusively on section 514(a) of ERISA (29 U.S.C. §1144(a)). (See Pet. App., 155a, 156a.)[4/] That section provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Petitioners urge this Court to focus only on the two words "relate to," construing them in the broadest possible manner while ignoring the remainder of the statutory language.

---

4. "Pet. App." refers to the Appendices to the Petition for a Writ of Certiorari. "Pet." will refer to the Petition itself.

However, as noted in the decision below (Pet. App., 156a), section 514(a) includes other essential terms which are expressly defined elsewhere in the body of ERISA and which cannot be disregarded in analyzing the scope and intent of the preemption provision. Most telling is Congress's definition of "State" as:

> ...a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans...

(ERISA section 514(c)(2); emphasis added.)

Petitioners suggest that the Court of Appeals created from whole cloth a new exception to preemption when it held that the ALRB's makewhole power was preempted only "if it both 'relate[s]' to an ERISA plan and 'purport[s] to regulate, directly or indirectly' ERISA plans." (Pet. App., 155a.) Yet it is plain that section 514

itself creates this two-prong test for preemption, and that the court's analysis is consistent not only with express statutory definitions, but also with other decisions addressing the question. (See, e.g., Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir. 1984); Rebaldo v. Cuomo, 749 F.2d 133, 137 & n.1 (2d Cir. 1984), cert. den., 105 S.Ct. 2702 (1985); Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 329 (2d Cir. 1982), aff'd. mem. sub. nom. Arcudi v. Stone & Webster Engineering Corp, 643 U.S. 1220 (1983) [to be preempted, state law must both "relate to" and "purport to regulate" ERISA plans].)

ERISA preemption has never been established merely by the fact that a state agency or court acknowledges, notes, makes reference to, observes, or compares employee benefit plans, as petitioners urge. Such an irrational, all-encompassing

approach would lead to absurd results. (See Argument III, infra.) Rather, the party invoking preemption must show that the state decision, policy, or statute purports to somehow regulate, directly or indirectly, the plans. The California statute and ALRB orders challenged here do not. (See Argument II, infra.)

B. The Cases Relied On By Petitioners Are Readily Distinguishable on Their Facts.

Petitioners assert that there is a "direct conflict" between the court's application of section 514 below and this Court's discussions of ERISA preemption in Shaw v. Delta Air Lines, 463 U.S. 85 (1983), Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), and Metropolitan Life Ins. Co. v. Massachusetts, ___U.S.___ [105 S.Ct. 2380] (1985). In fact, there is no conflict. Instead, the distinctions between the

present case and the other three (Alessi, Shaw, and Metropolitan) derive from the different facts involved. This Court was not required to undertake the analysis followed by the Court of Appeals herein because, unlike the instant case, Alessi, Shaw, and Metropolitan involved state laws which plainly "purported to regulate, directly or indirectly," the terms and conditions of ERISA plans. Any discussion of that element of preemption would therefore have been quite unnecessary in those cases.

This Court's own descriptions make the point. In Metropolitan, the challenged state statute was:

> A Massachusetts statute requir[ing] that specified minimum mental-health-care benefits be provided a Massachusetts resident who is insured under a general insurance policy, an accident or sickness insurance policy, or an employee health-care plan that covers hospital and surgical expenses.

(105 S.Ct. at 2383.) In Shaw, the New York Human Rights Law prohibited a private employer from maintaining an "employee benefit plan [which] treats pregnancy differently from other nonoccupational disabilities." (463 U.S. at 88.) And in Alessi, this Court addressed a New Jersey statute which "eliminates one method of calculating pension benefits -- integration -- that is permitted by federal law." (451 U.S. at 524.)[5/] As noted by this Court, each statute intruded directly into ERISA's domain, purporting to regulate employee benefit plans. There is no parallel intrusion in the instant case. (See Argument II, infra.) Hence, there is no "conflict" requiring this Court's attention.

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5. It is noteworthy that the Alessi opinion quotes, with emphasis, the definition of "State" relied upon by the court below -- the definition which petitioners now ask this Court to delete from ERISA. (See 451 U.S. at 525.)

Indeed, as the Court of Appeals noted below, past applications of ERISA preemption have stemmed from four general categories of purported state regulation of benefit plans: laws regulating the type of terms or benefits offered; laws treating reporting, disclosure, vesting, or funding; laws dictating how benefits are calculated; and laws providing remedies for plan-related misconduct. (See Pet. App., 156a-158a & notes 15, 16, 17, & 18. See also findings of the district court, Pet. App., 140a-142a.) And, contrary to petitioners' claims, the state collective bargaining statutes and compensatory remedies challenged here do not even approach any of these categories, much less fall within them. Accordingly, the Court of Appeals' opinion herein creates no conflict with the authorities relied on in the petition for writ of certiorari.

II

PETITIONERS HAVE MISSTATED ESSENTIAL FACTS.

In their effort to bring the present case within the ambit of prior decisions finding ERISA preemption, petitioners have mischaracterized several significant facts. Indeed, their petition is to a large extent merely a call for reversal of various factual findings made in the trial court below -- a task not worthy of a writ of certiorari. A brief summary of the true nature of the California statute and remedies at issue will serve to emphasize that the writ should be denied.

A. California's Compensatory Makewhole Remedy For Unlawful Refusals-to-Bargain Does Not Create Benefit Plans, Require Benefit Terms, or Otherwise Regulate or Affect Existing Plans.

Petitioners assert that the ALRB "requires employers to provide a certain level of benefits on certain terms to its

employees" (Pet., 12), that the makewhole remedy "is in fact creating a benefit package" (Pet., 13), that the Board has "taken away" the employers' ERISA-protected "discretion" to design plans and to unilaterally determine benefit levels, eligibility, etc. (Pet., 6, 23), and that the State

> ...directly regulates all aspects of the benefit programs provided by the petitioners, including eligibility, participation, vesting, benefit accrual, forfeitures, tax implications, as well as disclosures.

(Pet., 16.) None of these claims is true.[6/] The same allegations were carefully considered and soundly rejected by both the Court of Appeals (Pet. App.,

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6. Petitioners assert that employees' makewhole compensation would be taxable as ordinary income rather than as an excluded ERISA benefit. (Pet., 22-23.) It is difficult to see how this fact buttresses the employers' arguments. Rather, the tax consequences seem to reinforce the Court of Appeals' holding that makewhole (a) does not affect existing plans, and (b) in no way creates new plans.

158a-162a) and the district court. (Pet. App., 140a-142a.)

As both courts recognized, the ALRB's makewhole remedy is merely an award of estimated damages. It is designed to compensate employees for losses incurred during the period when an employer's illegal conduct deprived them of their right to good faith collective bargaining. (See J.R. Norton Co. v. Agricultural Labor Relations Bd., 26 Cal.3d. 1, 31 [603 P.2d. 1306] (1979).) As the district court accurately observed below:

> The ALRB has not required plaintiffs to disburse any moneys from their existing plans, to add new provisions to such plans, to change existing provisions, to establish any new plans or trust funds, or to violate any of the fiduciary duties arising from existing plans.
>
> All the ALRB has done is to find that the plaintiffs have committed unfair labor practices, and to award compensatory damages to those employees who suffered losses as a result of plaintiffs' violations. These functions do not infringe upon or purport to regulate the field occupied by ERISA.

(Pet. App., 140a.) The Court of Appeals explained in somewhat greater detail the purpose and formulation of makewhole compensation:

> [A] "Make-whole" remedy is an award of damages designed to put workers in approximately the same economic position they would have been in had their employer bargained in good faith. This economic position can be determined only after determining the total compensation the workers would have received after good faith bargaining. The total compensation paid to any worker in normal circumstances may be paid partly in wages and partly in fringe benefits. The specific mix of wages and fringe benefits is irrelevant for the purpose of assessing damages. Regardless of the particular mix, the total value of the compensation package remains the same; if the amount of fringe benefits is greater, the amount of wages will be lesser, and vice-versa. When the ALRB decides to issue a "make-whole" award, it is only the total amount of compensation that matters. The ALRB does not order the payment of fringe benefits; rather, it requires the payment of damages in an amount equal to the difference between the estimated total value of the compensation package the employees should have received and the amount of compensation they actually received. Because the ALRB is not ordering the payment of fringe benefits, there is not even a colorable argument that it has created new ERISA plans, and the employers' second argument must fail.

(Pet. App., 159a-160a.)[7/] The ALRB and California Labor Code section 1160.3 are altogether uninvolved in the employers' existing ERISA plans; indeed, the Board does not care whether an employer even has any employee benefit plans, much less what the terms might be. As the district court noted:

> The only reference which the ALRB makes to such existing plans is to credit the employer's contributions thereto, if any, against the gross amount of employee damages.

(Pet. App., 141a.)

B. The Compensatory Makewhole Remedy is not "Open-Ended". It Stops When The Wrongdoers Cease Their Unlawful Conduct.

As additional support for their claim that the Board's damage award creates benefit plans, petitioners repeatedly

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7. Additionally, it should be noted that a plan, to be covered by ERISA, must be "established or maintained by an employer or by an employee organization, or by both..." (29 U.S.C. sec. 1002; emphasis added.) The ALRB's award of compensatory damages obviously falls outside this definition.

assert that the award represents an "ongoing obligation" which is "open-ended" and might go on "indefinitely". (See e.g., Pet., 13, 18.) They claim that the "remedy, as interpreted by [the ALRB] and enforced by California courts, is an open-ended award." (Pet., i.) In fact, both the ALRB and the California courts have taken special pains to make clear that this compensatory remedy is not "open-ended", even though the Board does not usually state -- in its initial liability decision -- a fixed date for termination of the remedy. Rather, like other economic remedies for unfair labor practices, the makewhole period ends when the wrongdoer ceases its unlawful conduct:[8/]

> The Board's order required [the wrongdoer] to make its employees whole from the date of the refusal to bargain until [it] "commences" to bargain in good faith. [Ftn. omitted]

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8. Petitioners repeatedly mischaracterize the duration of the remedy,
(Footnote Continued)

> Thus, the make-whole obligation runs only until [the employer] begins to bargain in good faith. The Board has defined good faith bargaining as such bargaining as leads to either contract or a bona fide impasse. Such an order does not compel the employer to make concessions to the Union at the bargaining table. Nor does it continue the make-whole order after commencement of bargaining in good faith. It was not an open-ended order.

(Ruline Nursery Co. v. Agricultural Labor Relations Bd., 169 Cal.App.3d 247, 264 (1985); emphasis added. See also, e.g., Transmarine Navigation Corp., 170 NLRB 389, 390 (1968).)

The Board has determined that the most fair and certain way to determine whether subsequent bargaining by the

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(Footnote Continued)

claiming that makewhole continues running until the employer and the certified union "reach agreement or reach valid impasse." (Pet., 2, 3, 6.) As the Board's orders make clear, however, the makewhole periods in fact run only until the wrongdoer "commences good faith bargaining... which results in a contract or bona fide impasse." (Pet App., 128a; emphasis added. See also 90a, 71a, 70a, 26a, 13a.)

wrongdoer is actually in good faith (as opposed to "surface bargaining" -- i.e. going through the motions of negotiating without the requisite bona fide intent to resolve differences) is to see whether the conduct leads to the appropriate result: either a collective bargaining agreement or a valid impasse. But the makewhole obligation ends before such a result, when the good faith collective bargaining begins.

III

PETITIONERS' NOVEL THEORY WOULD CREATE CHAOS IN THE LAW, AND WOULD PREVENT FULL AND FAIR COMPENSATION FOR INJURIES.

During oral argument before the Court of Appeals on March 7, 1985, counsel for petitioners was questioned about what impact the employers' theory of preemption might have in civil personal injury cases, wherein judges and juries traditionally consider lost pay -- including lost fringe benefits -- in assessing the extent of

damages. Counsel candidly admitted that, under the theory propounded by petitioners, ERISA would preempt any attempt to estimate what the fringe benefit portion of the victims' lost earnings might have been -- that is, the tribunal's mere attempt to quantify that aspect of damages would assertedly run afoul of ERISA section 514.[9/]

Such a rule has no basis either in the legislative history of ERISA or in general principles of fairness, and it would lead to chaos in and disrespect for the law.

IV

THE RESULT REACHED BELOW WOULD ALSO BE CORRECT UNDER THE THEORY, SUGGESTED BY THIS COURT'S METROPOLITAN LIFE DECISION, THAT COLLECTIVE BARGAINING STATUTES ARE EXEMPT FROM ERISA'S PREEMPTION CLAUSE.

In further support of the result reached by the Court of Appeals,

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9. Counsel for petitioners distinguished between (1) an injured person
(Footnote continued)

respondents submit that the statute and remedial orders challenged here are exempt from ERISA preemption. In Metropolitan Life, this Court ultimately determined that the disputed Massachusetts law was not preempted by ERISA because it fell within an express exemption as a law "which regulates insurance." (See 29 U.S.C. sec. 1144(b)(2)(A).) Although there is no such express statutory exemption for labor-management relations laws like the California ALRA, such an exemption is implied by various provisions of ERISA, by case law interpreting ERISA's preemption provision, and by Internal Revenue Codes effectuating ERISA's substantive guidelines.

(Footnote continued)

who lost work at a known job, in which case losses could permissibly be calculated based on existing ERISA plans, and (2) an injured person who was unemployed or who had not yet entered the labor force, in which case ERISA assertedly precludes any inquiry into the likelihood and/or probable amount of lost benefits.

A. ERISA Did Not Intend to Preempt State Laws Regulating Agricultural Labor Relations

It is well settled that Congress reserved for the states the right and authority to regulate labor-management relations among agricultural laborers. (29 U.S.C. sec. 152(3).) The ALRA is California's principal regulation in this field; several other states have similarly enacted laws to govern such employment relations. (See, e.g., United Farm Workers. v. Arizona Agricultural Employment Relations Bd., 669 F.2d 1249 (9th Cir. 1982.) Such statutes are exempt from ERISA's preemption provisions--even if they do, arguendo, "relate to" employee benefit plans--because,

> We... must presume that Congress did not intend [through ERISA] to preempt areas of traditional state regulation.

(Metropolitan Life, supra, 105 S.Ct. at 2389.) And, as the Court later noted,

> States possess broad authority

> under their police powers to regulate the employment relationship to protect workers within the State.

(Id., at 2398, quoting from De Canas v. Bica, 424 U.S. 351, 356 (1976).)

Thus, it must be presumed that Congress did not intend to preempt California's collective bargaining laws. This presumption is especially compelling given the fact that ERISA itself does not purport to protect or regulate collective bargaining; rather, ERISA expressly acknowledges and defers to labor-management relations laws, as will be shown below.

B. ERISA Itself Presupposes The Continued Vitality of Collective Bargaining Statutes, And Acknowledges That Such Laws May Affect Plans.

The exemption for labor-management relations laws is further apparent from the very language of ERISA itself. It is evident from various provisions of ERISA that Congress intended to exempt such collective-bargaining laws from ERISA

preemption even though, as the Metropolitan Life court noted, "welfare benefits are a mandatory subject of bargaining" under such labor laws. (Metropolitan Life, supra, 105 S.Ct. at 2395.)

For example, section 515 of ERISA (29 USC sec. 1145), which defines "delinquent contributions", plainly contemplates that employees will continue to have the right to negotiate concerning ERISA-covered plans in the context of good faith collective bargaining:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

(Emphasis added.)

Section 4212(a) of ERISA (29 USC sec. 1392(a)), defining the obligation to contribute, demonstrates even more clearly this congressional intention to exempt

labor relations laws, even if such laws touch upon ERISA-covered benefit plans:

> (a) Definition
> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising--
> (1) Under one or more collective bargaining (or related) agreements, or
> (2) as a result of a duty under applicable labor-management relations law ...

(Emphasis added.) Yet petitioners' preemption theory would have the effect of reducing employees' bargaining rights, encouraging unfair labor practices, and guaranteeing the unjust enrichment of wrongdoers. It would "violate the plain meaning" of ERISA sections 515 and 4212(a) (cf. Metropolitan Life, 105 S.Ct. at 2390.), and would eliminate or diminish employer duties and responsibilities which ERISA seeks to preserve.

C. This Court Has Similarly Assumed That Employees' Rights To Demand Good Faith Collective Bargaining Over Benefit Plans Remain Intact Under ERISA.

If the State is prevented from fully remedying bargaining violations, as petitioners urge, then bargaining duties become less enforceable and bargaining rights become illusory. That result would be inconsistent with this Court's recognition of the special importance attached to ERISA plans which have emerged from the collective bargaining process, and which accordingly reflect the wishes of the very workers who will be the participants of the benefit and health plans. (Alessi, 451 U.S. 504, 524-526, supra. See also Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 330, supra.)

These observations, too, suggest that ERISA's preemption clause carries an implied exemption for labor-management relations laws.

D. Corresponding Internal Revenue Code Provisions Further Support Exemption.

As petitioners point out, various Internal Revenue Code provisions are designed to facilitate enforcement and administration of ERISA. One such provision also indicates that Congress intended to exempt from preemption state laws regulating collective bargaining rights. Internal Revenue Code section 410(b) addresses minimum participation standards for ERISA-covered employee retirement plans. However, subsection 410(b)(3)(A) specifically excludes from these participation requirements any employees who--by exercising their right to bargain about such benefit plans--have elected an alternative benefit package.10/

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10. Specifically, subsection 410(b)(3)(A) provides for exclusion of:

> (A) employees not included in the plan who are included in a
>
> (Footnote Continued)

In other words, the participation standards of ERISA are subordinated to those of retirement plans achieved by employees through good faith collective bargaining. Rather than preempting agricultural employees' rights to bargain about benefit plans under the ALRA, then, ERISA and its accompanying Internal Revenue Service regulations recognize that such bargaining rights are paramount. Congress could not have intended to weaken such rights by forbidding the states from remedying violations of the bargaining duty.

Footnote Continued)

> unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.
>
> (Emphasis added.)

And where, as here, an area of traditional state regulation is exempted from the generally broad scope of ERISA's preemption provision, Metropolitan Life teaches that such state laws--even if they "relate to" employee benefit plans in some fashion--are simply not preempted.

Thus, the result reached by the courts below would be correct even if petitioners had been able to present a state law which "relates to" ERISA plans within the meaning of section 514.

CONCLUSION

For the reasons presented above, respondents respectfully urge the Court to deny the petition for writ of certiorari.

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Respectfully submitted,

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